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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 619

THE STATE OF NEW JERSEY,

Respondent,

vs.

JOSEPH C. CAPRIO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

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IN THE

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No. .....

THE STATE OF NEW JERSEY,

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vs.

JOSEPH C. CAPRIO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT AND SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court and the Superior Court, Appellate Division, of the State of New Jersey.

I.

Summary statement of the matter involved.

(All Italics Supplied)

On February 11, 1953, a jury sitting in the Essex County Court of New Jersey found petitioner guilty of statutory extortion under N. J. S. 2A. 105-1.[1] Petitioner, a public officer of the City of Newark, was tried under a joint indictment wherein his brother, Nicholas Caprio, a seventy year old pharmacist, was joined as a co-principal (R., p. 1). The State's case was presented to the jury on a theory of joint participation, as a result of which, evidence, palpably incompetent and prejudicial to the petitioner, was interjected into the cause on the ground that it related to petitioner's brother. At the conclusion of the State's case, petitioner's brother was acquitted by the Court on the ground that the State had failed to show any participation by him in the crime charged. Thereafter, all the evidence introduced by the State on the theory of joint participation, including the incompetent evidence introduced for its binding effect on petitioner's brother, was submitted to the jury. Petitioner was thereby convicted.

The Court fined petitioner $1,000.00 and sentenced him to a term of two to three years in the New Jersey State Prison, where petitioner is presently incarcerated.

Petitioner appealed his conviction to the Appellate Division of the Superior Court of New Jersey urging (1) that he had been denied a fair trial because he had been

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[1] N. J. S. 2A:105-1 provides: "Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdemeanor."

tried jointly rather than singly, as the law and the facts warranted and (2) that his constitutional guarantee of a fair trial, embodied in the due process clause of the 14th Amendment, had been transgressed by the prosecutor and court alike. On September 1, 1953 the Appellate Division determined the constitutional question and ruled that petitioner had not been deprived of a fair trial.

Pursuant to Article 6, Section 5, Paragraph 1 (a) of the New Jersey Constitution, to wit, "appeals may be taken to the Supreme Court in causes determined by the Appellate Division involving a question arising under the Constitution of the United States or this State", petitioner appealed to the Supreme Court of New Jersey on the constitutional question theretofore urged and determined by the Appellate Division. On December 14, 1953 the Supreme Court dismissed petitioner's appeal on the ground that no constitutional question was involved. The Supreme Court thereby refused to determine the appeal on the merits, despite the constitutional mandate. This petition, therefore, has a double aspect: (1) Did the Appellate Division determine the constitutional question correctly when it ruled that the petitioner was not deprived of a fair trial and (2) was the Supreme Court correct in dismissing petitioner's appeal on the ground that no constitutional question was determined by the Appellate Division? Viewed from the double aspect, an incongruity becomes manifest. This petition seeks to resolve such an anomalous circumstance.

II (a).

Jurisdictional Statement.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U. S. C. A. Sec. 1257 (3). Your petitioner claims the infringement of a right, privilege or immunity under the Constitution of the United States, Amendment XIV, Section 1, and under the Constitution of the State of New Jersey, Article 1, Paragraph 1[2]; Article 1, Paragraph 10[3]; and Article 6, Section 5, Paragraph 1 (a).[4]

II (b).

Statement of the grounds upon which it is contended that the questions involved are substantial.

The nature of petitioner's case is inextricably intertwined with the meaning of "fair trial" as the same is guaranteed under the due process clause of the 14th Amendment. In the ever-recurring tug-of-war between the

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[2] N. J. Const., Art. 1, Par. 1, provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

[3] N. J. Const., Art. 1, Par. 10, provides: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defence."

[4] N. J. Const., Art. 6, Sec. 5, Par. 1 (a), provides:

"1. Appeals may be taken to the Supreme Court:

(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;".

prosecutor and the accused, the meaning of "fair trial" is often dimmed and the trial court, as arbiter, sometimes attaches a perspective to its meaning more in keeping with expediency, than with fundamental fairness. The State of New Jersey, speaking through its courts, has found that the meaning of a fair trial is not uniformly or easily described.[5] Further, with the passage of time there is an unwitting tendency to depart from the spirit and the ideal inherent in meaning of "fair trial", which is our heritage to share. The discretion of this Court is invoked to pronounce and define that which cannot be too constant a reminder, the meaning of "fair trial" in terms of fundamental justice.

The State of New Jersey prosecuted the petitioner jointly with his brother, Nicholas, as co-principals. The lower Court did not hesitate to acquit Nicholas at the close of the State's case. Manifest injury and prejudice, however, accompanied the petitioner from the return of the joint indictment to the very end of the jury's deliberations. Had your petitioner been tried singly, as the facts and law warranted, there would have been substantial fairness, in contrast to that afforded him under the joint indictment.

Your petitioner was deprived of an appeal on the merits to the Supreme Court of New Jersey, contrary to the mandate of the New Jersey Constitution, Article 6, Section 5, Paragraph 1 (a). In consequence, the nature of petitioner's case at the trial level, involving the question of a fair trial, the ruling of the Appellate Division on that

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[5] "Fair trial" is a term not uniformly or easily described by the Courts of New Jersey; it has been variously defined. See *Johnson* v. *City of Wildwood*, 116 N. J. L. 462 (E. & A., 1936); *Test* v. *Test*, 131 N. J. Eq. 197 (E. & A., 1941); *DiMaio* v. *Reid*, 132 N. J. L. 17 (Sup. Ct., 1944); *Levinson* v. *Mooney*, 128 N. J. L. 569 (Sup. Ct., 1942); *Kruttschnitt* v. *Hagamen*, 128 N. J. L. 246 (Sup. Ct., 1942).

constitutional question and the decision of the Supreme Court in dismissing petitioner's appeal on the ground that no constitutional question was involved, present issues of vital import to the petitioner and the entire citizenry of the United States. The "glittering generality" and the "attenuated subtlety" form no part of this petition. Your petitioner seeks a declaration of things far more substantial, the right to a fair trial in terms of fundamental justice and the right of an appeal to test the deprivation of that right.

The questions involved herein are of substantial importance in the uniform administration of justice. The founding fathers of our Republic may not have been attuned to the flexible concept of due process set forth in *Wolf* v. *Colorado,* 338 U. S. 25, but who can deny that they were guided in part by the sentiment of fundamental justice expressed in *Palko* v. *Conn.,* 302 U. S. 319. The measure of a fair trial in terms of fundamental justice should not vary in weight or proportion, according to the respective prerogative of the separate States. The right of a fair trial in terms of fundamental justice forms the core of our jurisprudence and the "Due Process Clause" is the bar which guards that basic right. That bar must not be lowered. The empiric process of "inclusion and exclusion" set forth in *Davidson* v. *New Orleans,* 96 U. S. 97, had inherent in its meaning "preservation" and "protection". If the State of New Jersey has deprived your petitioner of a fair trial in terms of fundamental justice, it is incumbent upon this Court to draw some line beyond which such entrenchment constitutes a deprivation of due process of law under the 14th Amendment. But no matter where the line be drawn, nor by what process or method, there is a need for the super-imposition by this court of a definition

of fair trial in terms of fundamental justice; a definition which would insure an equal and constant measure of justice under our Constitution for all. What is sought is not a uniform code of criminal procedure, but a recognition of the ultimate dignity of man.[6] In the words of Justice Cardoza:

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in Constitutions, and consecrating to the task of their protection a body of defenders.'"[7]

II (c).

Opinions below.

The opinion of the Appellate Division of the Superior Court of New Jersey, not officially reported, is set forth in the transcript (R., pp. 146-152).

The opinion of the Supreme Court of New Jersey is reported in 14 N. J. 64 (R., pp. 158-159) as follows:

> "The opinion of the court was delivered by
>
> VANDERBILT, C. J. (orally). The defendant Joseph C. Caprio was convicted of extortion. On his appeal to the Appellate Division of the Superior Court the same grounds of appeal that have been presented here were briefed and argued and duly passed on by the Appellate Division in deciding the case and affirming the conviction below. Defendant now appeals to this court

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[6] *Snyder* v. *Mare*, 291 U. S. 173.

[7] Nature of the Judicial Process, p. 92.

and urges that these same grounds raise a constitutional issue affecting his right to a fair trial under the Fourteenth Amendment to the United States Constitution. On the basis of this alleged constitutional question he asserts the right to appeal to this court under *Article* VI, *Section* V, *paragraph* I, of the *New Jersey Constitution of* 1947. The six points that are urged in support of this contention are set forth in his brief as follows:

(1) The first and immediate injurious effect of such joinder was to eliminate the value of Nicholas as a witness for the defense. While such joinder did not render Nicholas incompetent to testify, any testimony offered by him would bear the taint of a party, criminally accused.

(2) The second injurious effect of the joinder of Nicholas as a co-defendant was to enable the prosecutor to introduce evidence binding on Nicholas, yet palpably incompetent as to Joseph.

(3) The third injurious effect of the joinder of Nicholas as a co-defendant enabled the prosecutor to shift his position and theory of prosecution to meet the changing temper of the trial.

(4) The fourth injurious effect of the joinder of Nicholas as a co-defendant was to enable the prosecutor to try the co-defendants as joint participants, acting in concert, so that the acts and declarations of each would be binding on the other.

(5) The fifth injurious effect of the joinder of Nicholas Caprio as a co-defendant enabled the prosecutor to secure a conviction by confusion.

(6) Aggravating the five injurious effects caused by the joinder, was the undue weight imparted by the court to the testimony of the State's witness, Stefanelli.

We have all read the briefs very carefully and we have extended the time of defendant's counsel to present his oral argument here. After full consideration we are of the opinion that no constitutional question is presented under any of the six points raised by him. Nor do we deem any of them worthy of granting of certification as is petitioned by the defendant in his answer to the State's motion to dismiss.

The appeal is therefore dismissed, and the motion to certify is denied."

II (d).

Specific portions and reference to the record of the matter supporting the assertion that the courts' rulings were of a nature to bring the case within the statutory jurisdictional provision.

A. That the prosecutor and court alike transgressed petitioner's constitutional guaranty to a fair trial.

The first transgression occurred by way of pleading, *i. e.*, the indictment (R., pp. 1 and 2):

INDICTMENT FOR EXTORTION No. 784.

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that:

FIRST COUNT.

"On or about the 8th day of May, 1952, at the Town of Belleville, Essex County aforesaid, Joseph C. Caprio, being a public officer of the City of Newark, Essex County aforesaid, to wit, a member of the Board of Adjustment of the City of Newark, and *Nicholas Caprio,* unlawfully and corruptly did

receive and take, by color of the office of the said Joseph C. Caprio, from Ernest Stefanelli, the sum of two thousand eight hundred dollars, a fee not allowed by the laws of the State of New Jersey for performing the duties of the office of said Joseph C. Caprio, contrary to the provisions of N. J. S. 2A:105-1, against the peace of the State, the government and dignity of the same."

SECOND COUNT.

"And the Grand Jurors aforesaid, upon their oath do further present that at the time and place set forth in the First Count hereof, the said Joseph C. Caprio, being a public officer of the City of Newark, Essex County aforesaid, to wit, a member of the Board of Adjustment of the City of Newark, and *Nicholas Caprio,* unlawfully and corruptly did receive and take, by color of the office of the said Joseph C. Caprio, from Ernest Stefanelli, the sum of two thousand eight hundred dollars, a reward not allowed by the Laws of the State of New Jersey for performing the duties of the office of said Joseph C. Caprio, contrary to the provisions of N. J. S. 2A:105-1, against the peace of this State, the government and dignity of the same."

/s/ EDWARD GAULKIN,
County Prosecutor.

Further transgression occurred during the prosecutor's examination of the State's complaining witness (R., p. 32):

"Q. What did you do with the $2,800.00 in cash? A. I put it in an envelope and delivered it to Nick *and told him to give it to Joe.*"

Among further conversations between the complaining witness and petitioner's brother, Nicholas, out of the presence of petitioner, are the following (R., p. 20):

"Q. Did you have any conversation with Nicholas Caprio as to why you were going to Joseph Caprio's house?

Mr. Campbell: I object to it as leading. I think the witness should be asked the question what the conversation, if any, was.

The Court: I will allow the question.

A. Yes.

Q. And what was that conversation? A. Well, I told him I had bought that piece of property and I wanted to see if Joe could help me out with the permit."

(R., p. 25):

"Q. Before; all right. Now what was the conversation that you had with Nicholas Caprio at your mason supply office on Franklin Street, Belleville?

Mr. McGlynn: May I respectfully suggest that we have the date fixed a little more definitely?

The Court: Well, if it can be fixed more definitely. Do you remember when it was that you had this conversation with Nicholas in your mason material yard?

The Witness: Well, I can't tell you the exact date.

The Court: Well, give us your best recollection of the date.

The Witness: It was about a week and a half after the first hearing.

Q. About a week and a half after the first hearing? A. Yes.

Q. And do you remember what day of the week it was? A. On a Saturday.

Q. On a Saturday. And can you fix that Saturday with reference to when you went down to the Board of Adjustment for the second time? A. Between a week and a week and a half, again.

Q. Well, now, you were there on April 24th, and they adjourned to May 8th? A. Well, it was before May 8th.

Q. Will you tell us what the conversation was that you had with Nicholas Caprio? A. Nick said, 'Ernest, Joe is over at the drug store.' "

(R., p. 26):

"He said, 'He would like to see you.'

I said, 'O. K., Nick.'

I happened to be busy, that I didn't go over.

Q. Excuse me for interrupting you just a moment, Mr. Stefanelli. Did Nicholas Caprio say anything further? A. No, he just said Joe wanted to see me; he was over there.

Q. Joe wanted to see you? A. That's right.

Q. And you said you were busy? A. That's right. I said, 'I will be over as soon as I get a chance.'

Q. Did Nicholas Caprio leave? A. He left, and he come back about an hour and a half to two hours later. He said, 'Joe is over there still waiting for you, Ernest'.

I said, 'O. K., I will be over.' I said, 'I really forgot.' So I went over."

As to the trial court's ruling on the motion for a directed verdict of acquittal for petitioner (R., p. 60):

"It seems to me that the proof demonstrates, or at least requires the inference that Nicholas, in receiving the money, was acting as the agent of Joseph; and when the money was turned over to Nicholas and he accepted it, and what was done later was done in accordance with the agreement; that the jury is entitled to infer that payment to Nicholas was payment to Joseph."

As to the trial court's charge to the jury (R., pp. 98, 99):

"The Court: Members of the Jury:

You have before you for consideration and determination an indictment returned by the Grand Jury of this county against the defendant, Joseph C. Caprio, charging him with the crime which is commonly called extortion.

Although the indictment was read accurately to you by the Prosecutor at the outset of the trial, I think I shall read it to you again.

It says:

'Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that:

First Count.

On or about the 8th day of May, 1952, at the Town of Belleville, Essex County aforesaid, Joseph C. Caprio, being a public officer of the City of Newark, Essex County aforesaid, to wit, a member of the Board of Adjustment of the City of Newark, and Nicholas Caprio, unlawfully and corruptly did receive and take, by color of the office of the said Joseph C. Caprio, from Ernest Stefanelli, the sum of two thousand eight hundred dollars, a fee not allowed by the Laws of the State of New Jersey, for performing the duties of the office of said Joseph C. Caprio, contrary to the provisions of N. J. S. 2A:105-1, against the peace of this State, the government and dignity of the same.

Second Count.

And the Grand Jurors aforesaid, upon their oath do further present that at the time and place set forth in the First Count hereof, the said Joseph C. Caprio, being a public officer of the City of Newark (134) Essex County aforesaid, to wit, a member of the Board of Adjustment of the City of Newark, and Nicholas Caprio, unlawfully and corruptly did receive and take, by color of the office of the said Joseph C. Caprio, from Ernest Stefanelli, the sum of two thousand eight hundred dollars, a reward not allowed by the laws of the State of New Jersey for performing

the duties of said Joseph C. Caprio, contrary to the provisions of N. J. S. 2A:105-1, against the peace of this State, the government and dignity of the same.'

Now as you are aware, at the close of the case of the State, on a motion made on behalf of the defendant, Nicholas Caprio, I concluded that there was not sufficient evidence to justify or to require the submission of the case to you for determination as to the defendant Nicholas Caprio. Consequently, for the reasons that I undertook to explain to you at some length when I granted the motion, the indictment was dismissed as to that defendant.

Although I have again read the indictment to you, you will have it in the jury room with you for further examination."

(R., p. 101):

"An *indictment*, under our law, is simply a charge, a formal *charge* against the defendant, and it has no force or value as evidence on the issue of his guilt."

(R., p. 101):

"Well, a reasonable doubt is not a mere possible doubt, members of the jury, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the *charge*."

(R., p. 101):

"To put it another way: If after a consideration of all of the evidence, you have an abiding conviction to a moral certainty of the truth of the *charge*, then the State has sustained the burden of proof."

(R., p. 99):

"The defendant Joseph Caprio has entered a not guilty plea to that indictment, and this trial and your participation in it are for the purpose of determining his guilt or innocence of that *charge.*"

(R., p. 100):

"Now since the State has made this *charge* against the defendant, under our law it must bear the burden of establishing his guilt beyond a reasonable doubt."

(R., p. 108):

"Now in approaching your study of the facts and in appraising the evidence, it is proper also for you to ask yourselves whether it is likely, if a transaction of this did take place, you would expect to find many witnesses present."

B. That your petitioner was deprived of an appeal to the Supreme Court of New Jersey, contrary to the constitutional mandate of New Jersey, Article 6, Section 5, Paragraph 1 (a).

Article 6, Section 1, Paragraph 1(a) of the Constitution of the State of New Jersey specifically provides that "appeals may be taken to the Supreme Court in causes determined by the Appellate Division involving a question arising under the Constitution of the United States or this State."

On September 1, 1953 the Appellate Division determined the cause at bar involving a question arising under the constitution of the United States (R., pp. 146 to 150). The Appellate Division ruled:

"The first point advanced by defendant Joseph Caprio is that his 'constitutional guaranty of a fair trial, embodied in the Fourteenth Amendment, was

transgressed by prosecutor and court alike in the trial below.'

In support, it is first contended that the joint trial of the defendant Joseph Caprio with his brother Nicholas Caprio 'provoked the lowering of the bars guarding the right of an accused to a "fair trial"' because the 'effect of such joinder was to eliminate Nicholas Caprio as a witness, *per se*, for the defense. While such a joinder did not render Nicholas Caprio incompetent to testify, any testimony offered by him would bear the taint of a party, criminally accused.' Not only was there no elimination of Nicholas Caprio as a witness, but on the contrary, Nicholas Caprio did take the witness stand as a defense witness for Joseph; and before taking the stand as a witness for Joseph, Nicholas was acquitted and the jury was made fully aware thereof. Defendant Joseph made no claim before the trial court that a joint trial of the defendants would be prejudicial to him; he made no motion for a severance. This contention has no merit.

Next, it is contended that Joseph was deprived of a fair trial because the trial court 'permitted the jury to take the original indictment to the jury room, without cautioning the jury that any reference therein to Nicholas Caprio should be completely ignored.' The trial court disposed of the motion for acquittal of Nicholas Caprio in the presence of the jury, and after a full recital of the pertinent evidence and his reasons for granting the motion, stated: 'And as I see the proof at this posture of the case as to Nicholas, it is not sufficient to justify submitting it to a jury for determination.' Further, the court in its charge to the jury stated:

> 'Now as you are aware, at the close of the case of the State, on a motion made on behalf of the defendant, Nicholas Caprio, I concluded that there was not sufficient evidence to justify or to require

the submission of the case to you for determination as to the defendant Nicholas Caprio. Consequently, for the reasons that I undertook to explain to you at some length when I granted the motion, the indictment was dismissed as to that defendant.

'Although I have again read the indictment to you, you will have it in the jury room with you for further examination.

'The defendant Joseph Caprio has entered a not guilty plea to that indictment, and this trial and your participation in it are for the purpose of determining his guilt or innocence of that charge.'

There was no request on behalf of the defendant Joseph Caprio for any further instruction in this regard, and we fail to see how he suffered any manifest injury from the action of the trial court.

Next, it is claimed that Joseph was deprived of a fair trial because the joinder of Nicholas Caprio as a co-defendant enabled the State to introduce evidence binding on Nicholas Caprio, yet palpably incompetent as to the defendant Joseph Caprio. If counsel for defendant Joseph Caprio had desired to protect his client against the effect of any such testimony, he should have requested the court to instruct the jury that, although it was evidential as against Nicholas Caprio, it was not evidential as against Joseph Caprio (State *v.* Cortese, 4 N. J. Misc. 683 (Sup. Ct., 1926), aff'd O. B. 104 N. J. L. 447 (E. & A., 1927), but this he did not do. We note that counsel for the defendant Nicholas Caprio sought and was granted this protection for his client. The defendant Joseph Caprio cannot now be heard to complain on this ground.

Further, it is argued that Joseph was deprived of a fair trial because the State shifted its theory from one charging Nicholas Caprio with corrupt and unlawful intent to one of innocent agency. The State sought a conviction against the defendant Nicholas Caprio under the indictment but, as pointed

out above, the motion on behalf of Nicholas for acquittal was granted. We fail to see how the State shifted its theory as to Nicholas Caprio or how such a shift, if it did occur, was prejudicial to Joseph Caprio.

A further contention is made that Joseph was deprived of a fair trial because the effect of the joinder 'was to enable the prosecutor to try the co-defendants as joint participants, acting in concert, so that the acts and declarations of each would be binding on the other.' We find no specific matter for review presented under this contention. We note, however, that no claim of prejudice was made by Joseph before the trial court based on either the joinder of the defendants in the indictment or on the joint trial of the defendants.

While Rules 1:2-19 (a) and 4:2-6 authorize this court, on an appeal in a criminal cause, to 'notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court,' we find in this case no occasion for the exercise of such power. Cf. State v. Picciotti, 12 N. J. 205 (1953)."

On December 14, 1953, the Supreme Court dismissed the appeal on the ground that no constitutional question was involved, thus holding in effect that no constitutional question was determined by the Appellate Division (R., pp. 158, 159).

III.

Statement of the questions involved.

Whether the essential elements of fundamental fairness and due process assured to your petitioner by the 14th Amendment of the Constitution of the United States and by Article 1, Paragraphs 1 and 10 of the Constitution of

New Jersey, were denied (a) when petitioner and his brother were tried as co-principals in the joint indictment below, (b) when the trial of the petitioner was allowed to proceed, after the acquittal of petitioner's brother at the end of the State's case, without proper cautionary instructions by the court to the jury relative to the incompetent evidence introduced by the prosecutor solely on the theory of joint participation, (c) when the trial court ruled, commented on the evidence and charged the jury as it did, and (d) when the Appellate Division of the Superior Court of New Jersey affirmed the conviction on the grounds that the petitioner was not deprived of a fair trial?

Whether your petitioner was deprived of due process and the equal protection of the laws under the 14th Amendment of the Constitution of the United States when he was denied an appeal to the Supreme Court of New Jersey, guaranteed to your petitioner by Article 1, Section 5, Paragraph 1 (a) of the Constitution of New Jersey?

IV.

Reasons relied on for allowance of writ.

1. The Appellate Division of the Superior Court of New Jersey decided a federal question of substance, "Whether petitioner's guaranty to a fair trial, embodied in the due process of the 14th Amendment, was transgressed by prosecutor and court alike," in the trial below, which decision is not in accord with its own decisions, the decisions of the Supreme Court of New Jersey, nor with the decisions of this court and other courts, set forth in the table of cases, including the cases of:

Andres v. *U. S.*, 333 U. S. 740;
Baker v. *Hudspeth*, 129 F. 2d 779;

Cole v. *Arkansas*, 333 U. S. 201;
Crawford v. *U. S.*, 212 U. S. 183;
Davidson v. *New Orleans*, 96 U. S. 97;
Glasser v. *U. S.*, 315 U. S. 60;
Kinard v. *U. S.*, 96 F. 2d 522;
Kreiner v. *U. S.*, 11 F. 2d 722;
Kretske v. *U. S.*, 313 U. S. 551;
Krulewitch v. *U. S.*, 336 U. S. 440;
Little v. *U. S.*, 73 F. 2d 861;
Miller v. *U. S.*, 120 F. 2d 968;
Palko v. *Conn.*, 302 U. S. 319;
Quirin, Ex parte, 317 U. S. 1;
Snyder v. *Mare*, 291 U. S. 173;
Sparf v. *U. S.*, 156 U. S. 51;
Trockmorton v. *Holt*, 180 U. S. 552;
U. S. v. *Angelo*, 153 F. 2d 247;
U. S. v. *Laudani*, 134 F. 2d 847;
Wolf v. *Colorado*, 338 U. S. 25.

2. The decision of the Appellate Division of the State of New Jersey, affirming the trial court, is in conflict with the decisions of this Court, the decisions of the State of New Jersey and others, because fundamental principles, inherent in the very meaning of justice, were ignored as follows: (a) that there is no warrant for a joint indictment and trial, when its purpose is to secure the conviction of only one, (b) that the guilt or innocence of an accused is to be weighed by the competent evidence alone, (c) that the comments and charge of the court to the jury is to be predicated on competent evidence, (d) that the jury is to be informed that it cannot weigh or consider incompetent evidence, (e) that the guilt of an accused should not result from confusion or misunderstanding as to the meaning of the indictment and (f) that the court is under a duty and obligation to charge the jury correctly on the essential questions of law.

3. The decision of the Appellate Division of the Superior Court of New Jersey reflects a marked departure and stands in sharp contrast with the current development of the law as expressed in this Court and the Federal Courts. Generically, a fair trial, involving fundamental justice, is encompassed by both the 5th and 14th Amendments. The same ideal transcends the meaning of "fair trial," be it in the Federal Court or the State Court. Considerations, apart from those involved herein, may compel an application of due process which may vary the result obtained in the respective Courts, but such considerations have not overshadowed the ideal. The pronouncements of the Federal Courts are clear, as represented by *Miller* v. *United States*, 120 F. 2d 968 (C. C. A., Kan. 1941):

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. Those bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

4. The decision of the Supreme Court of New Jersey dismissing petitioner's appeal presents a conflict which is most apparent and which need not be elaborated by citation of authority or glossary of precedents. The Appellate Division of the Superior Court of New Jersey determined that petitioner's constitutional guaranty to a fair trial, embodied in the 14th Amendment, was not transgressed. Petitioner sought to appeal such a determination to the Supreme Court of New Jersey, pursuant to Article 6, Section 5, Paragraph 1(a) of the New Jersey Constitution which provided for such an appeal. The Supreme Court of New Jersey refused to entertain petitioner's appeal on the

ground that no constitutional question was involved, thus holding, in effect, that the Appellate Division had not determined a question involving the constitution of the United States. The decision of the Supreme Court stands in open conflict with that of the Appellate Division and the New Jersey Constitution. Petitioner seeks to untie that Gordian knot and preserve the right of appeal guaranteed to him under the New Jersey Constitution.

Conclusion.

A writ of certiorari should be issued by this Honorable Court for the reasons stated and in the public interest, so that it may be our heritage to share a fair trial with fundamental justice, and the right to test such fundamental fairness by appeal, especially when guaranteed by the State Constitution.

Respectfully submitted,

RALPH G. MESCH,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

DOCKET NO. .....

THE STATE OF NEW JERSEY,

Respondent,

vs.

JOSEPH C. CAPRIO,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(All italics supplied.)

I.

Opinions of the Courts Below.

The opinion of the Appellate Division of the Superior Court of New Jersey, not officially reported, appears in the record submitted herewith (R., pp. 146-152). The opinion of the Supreme Court of New Jersey is reported in 14 N. J. 64 (R., pp. 158, 159).

II.

Jurisdictional statement.

1. The date of the judgment to be reviewed is December 14, 1953.

2. The statutory provision which sustains the jurisdiction of this Court is Title 28 U. S. C. A., Sec. 1247 (3).

3. The nature of the case, the rulings below, and the statement of facts and references thereto in the record, to bring this case within the jurisdictional provision relied on, have been set forth and are stated in the preceding petition for review by certiorari under I and II, which are hereby adopted and made part of this brief.

4. The cases believed to sustain said jurisdiction are set forth in the preceding petition under IV.

III.

Statement of the Case.

Petitioner, an official of the City of Newark, New Jersey, was indicted and tried jointly with his brother, Nicholas Caprio. The crime charged was statutory extortion under N. J. S. 2A:105-1 (R., p. 1). An indictment numerically prior to the one at bar, charging petitioner individually with the identical accusation (R., p. 2) was not moved by the prosecutor and is still pending. The prosecutor, instead, pressed the joint indictment for trial.

Except for two incidental particulars, the oral proof offered by the State on the joint indictment consisted solely of the testimony of a single witness, Ernest N. Stefanelli, an alleged accomplice. The State's case was presented on a theory of joint participation, i.e. that petitioner and his brother were equally guilty as joint participants in the crime charged, despite the fact that both the law and the facts militated against such a joint charge. Testimony was introduced by the State which was properly admissible against petitioner's brother, yet palpably incompetent as concerned the petitioner. Reference to such testimony is made in the preceding petition under II(c). As an example, when the State's witness, Stefanelli, was asked

"What did you do with the $2,800.00 in cash?", the reply was that he put it in an envelope, delivered it to petitioner's brother, Nicholas, *and that he told Nick to give it to Joe* (R., p. 32). Thus the testimony, while admissible against Nicholas, as a tacit admission by a party to the action, was adulterated with hearsay, as it involved the petitioner, because it was alleged to have been made out of the presence of the petitioner.

The State, in its argument before the Appellate Division of the Superior Court conceded that this testimony was technically hearsay, but it urged that regardless of the damaging influence on petitioner's case, as maintained, it was entirely competent and properly received.

Further testimony adduced by the prosecutor from the State's witness, Stefanelli, indicated, if believed, that Stefanelli was the solicitor and accomplice in the crime charged. Stefanelli testified that he solicited the favor from petitioner and that in accordance with an understanding he delivered a sealed envelope containing $2,800.00 to petitioner's brother. On cross examination, he could not recall distinctly whether he handed it to Nicholas or laid it on a counter. He said: "I know I just walked in in a hurry, and I walked out" (R., p. 48).

At the close of the State's case petitioner and his brother each moved for a judgment of acquittal. The Court granted the motion made by petitioner's brother and denied the motion made by the petitioner, thus making the petitioner the sole defendant in the cause.

The court, thereafter, offered no cautionary instructions, rulings, comments or charge to the jury respecting the incompetent testimony previously introduced by the State on the theory of joint participation.

The trial court, in instructing the jury and commenting on the evidence, read the original indictment in its

entirety as constituting the basic charge. The name of petitioner's brother, Nicholas Caprio, the acquitted co-defendant was not deleted from the indictment or from the minds of the jury. The court then added that the jury would have the original indictment in the jury room for further examination. Throughout this portion of the charge, no word of caution was given to the jury that any reference in the indictment to the name of "Nicholas Caprio" should be expurged and removed from their consideration of that indictment. Thus the name "Nicholas Caprio" remained as part of the basic charge.

The court informed the jury that the indictment is the charge (R., p. 101). In line with the foregoing, the Court then proceeded to instruct the jury in terms of that charge, without any cautionary direction regarding the name "Nicholas Caprio" contained therein, as follows (R., p. 101):

> "Well, a reasonable doubt is not a mere possible doubt, members of the jury, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the *charge.*"

(R., p. 101):

> "To put it another way: If after a consideration of all of the evidence, you have an abiding conviction to a moral certainty of the truth of the *charge,* then the State has sustained the burden of proof."

(R., p. 99):

> "The defendant Joseph Caprio has entered a not guilty plea to that indictment, and this trial

and your participation in it are for the purpose of determining his guilt or innocence of that *charge.*"

(R., p. 100):

"Now since the State has made this *charge* against the defendant, under our law it must bear the burden of establishing his guilt beyond a reasonable doubt."

Finally, the court charged (R., p. 108):

"Now in approaching your study of the facts and in appraising the evidence, it is proper also for you to ask yourselves whether it is likely, if a transaction of this did take place, you would expect to find many witnesses present."

There was a complete absence of instructions by the court on such essential questions of law involved in the case at bar, as the weight to be accorded the testimony of an accomplice and the law applicable to circumstantial evidence.

The jury in response to the Court's charge returned a verdict of "guilty, as charged." The court clerk then asked: "Members of the jury, listen to your verdict as your foreman has reported it and as the Court has recorded it. You say you find the defendant, Joseph C. Caprio, guilty in the manner and form set forth in the indictment, and so say you all. The jury replied: "Yes" (R., p. 109).

Your petitioner then appealed to the Appellate Division of the Superior Court of New Jersey on the ground that his constitutional guarantee to a fair trial, embodied in the due process clause of the 14th Amendment was transgressed by prosecutor and court alike. The Appellate Division determined the constitutional question and ruled that the petitioner was not deprived of a fair trial (R., pp. 146-152).

Your petitioner then appealed the constitutional question to the Supreme Court of New Jersey, pursuant to Article 6, Section 5, Paragraph 1 (a) of the New Jersey Constitution (R., p. 154). The Supreme Court of New Jersey dismissed the appeal (R., p. 159).

IV.

Specification of Errors.

1. The Appellate Division of the New Jersey Superior Court committed error when it determined that petitioner's guarantee to a fair trial, embodied in the due process clause of the 14th Amendment, was not transgressed by the prosecutor and the Court in the trial below.

2. The Appellate Division of the New Jersey Superior Court committed error when it affirmed the action of the trial Court in the following respects:

(a) in sanctioning the use and practice of a joint indictment and joint trial, when not warranted by the law or the facts;

(b) in failing to control the competency of the evidence for the jury's consideration at two stages of the trial; first, when the co-defendant was acquitted and, secondly, when the entire case was submitted to the jury;

(c) in securing a conviction by confusion, as it concerned the extent and meaning of the original indictment and the basic charge, without the deletion of the name "Nicholas Caprio" appearing therein;

(d) in failing to instruct the jury correctly;

(e) in failing to instruct on essential questions of law;

(f) in giving undue weight to the testimony of the alleged accomplice, Stefanelli, the State's complaining witness.

3. The Supreme Court of New Jersey committed error when it dismissed petitioner's appeal on the ground that no constitutional question was involved, contrary to the mandate of the New Jersey Constitution which guarantees such a right of appeal for petitioner.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT I: The New Jersey Constitution guarantees an appeal as of right to the Supreme Court of New Jersey in causes determined by the Appellate Division involving a constitutional question. The instant case was emcompassed by that guarantee. The Supreme Court, however, dismissed petitioner's appeal on the ground that no constitutional question was involved, thus superseding the express language contained in the constitutional mandate. The guaranteed right of appeal is not subject to limitation, qualifications or any prerequisite finding by the Supreme Court that a constitutional question is involved. The finality of the involvement of a constitutional question rests with the Appellate Division alone. The Supreme Court is not empowered to challenge an express finding of such involvement.

POINT II: Petitioner's guarantee of a fair trial, embodied in the due process clause of the 14th Amendment, was transgressed by prosecutor and court alike. The prosecutor, in his zealousness to secure the petitioner's conviction, sought and moved a joint indictment, wherein

petitioner's brother was joined as a co-principal. There was no warrant for such a joint indictment, either in the law or in the facts. The first effect of such a joinder was to eliminate the value of petitioner's brother as a witness for the defense. The second effect of such joinder was to enable the prosecutor to introduce incompetent evidence against the petitioner. The third effect of such joinder enabled the prosecutor to shift his position from "joint participation" to one of "innocent agency." The fourth effect of such joinder was to enable the prosecutor to try the co-defendants as joint participants, so that the acts and declarations of each would be binding on the other. The fifth effect of such joinder enabled the prosecutor to secure a conviction by confusion. The court did nothing to relieve the petitioner of the prejudice caused by such a joinder, gave undue weight to the testimony of an alleged accomplice and failed to charge the jury respecting essential questions of law.

POINT I.

Petitioner was denied "due process of law" and "the equal protection of the laws," guaranteed by the 14th Amendment, when the Supreme Court of New Jersey refused to entertain his appeal.

Article 6, Section 5, Paragraph 1 (a) of the New Jersey Constitution guaranteed petitioner's right to such an appeal. It provides that appeals may be taken to the Supreme Court in causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or New Jersey.

It is respectfully submitted that the appeal herein was taken from a final judgment of the Appellate Division in a cause involving a question arising under the Constitution

of the United States, to wit, was defendant's constitutional guarantee of a fair trial, embodied in the due process clause of the 14th Amendment, transgressed by either the prosecutor or the court in the trial below?

The Appellate Division was not unmindful of the presentation of such a constitutional question, see (R., p. 147) as follows:

> "The first point advanced by the defendant, Joseph C. Caprio, is that his constitutional guaranty of a fair trial, embodied in the Fourteenth Amendment, was transgressed by prosecutor and court alike in the trial below."

That particular constitutional question was fully resolved and determined by the Appellate Division. Its final judgment of affirmance on that constitutional question was the sole subject matter of appeal to the Supreme Court of New Jersey. It is respectfully submitted, therefore, that defendant's appeal to the Supreme Court of New Jersey was undertaken pursuant to the constitutional mandate.

In addition to the principal constitutional question involving "fair trial" under the due process clause, defendant's brief filed with the Court contained a series of 4 subsidiary constitutional questions, all of which related to the principal question involving "fair trial". These subsidiary constitutional questions involved the following:

1. Whether the defendant was deprived of the right, secured by Art. 1, Par. 10 of the N. J. Constitution, to have compulsory process for obtaining witnesses in his favor?

2. Whether the defendant was deprived of the right, secured by Art. 1, Par. 10 of the N. J. Constitu-

tion, to be informed of the nature and cause of the accusation, as it involved the indictment, *per se*.

3. Whether the defendant was deprived of the right, secured by Art. 1, Par. 10 of the N. J. Constitution, to be informed of the nature and cause of the accusation, when the prosecutor shifted the theory of prosecution from joint participation to one of innocent agency?

4. Whether the conviction of a crime not proved, can be sustained merely because the evidence, if believed, might prove another crime, not charged, is a deprivation of defendant's right to due process under the 14th Amendment of the U. S. Constitution and a further deprivation of his right to be informed of the nature and cause of the accusation, pursuant to Art. 1, Par. 10 of the N. J. Constitution?

It is respectfully submitted that each of the foregoing so-called subsidiary constitutional questions warranted the invocation of the constitutional provision granting an appeal as of right.

The principal constitutional question of "fair trial", involving as it did the four subsidiary constitutional questions already set forth, was not "plainly and unmistakably devoid of merit", as the Supreme Court of New Jersey[8] would characterize the feigned or frivolous issue, guised in the form of a constitutional question. The appeal at bar, on the other hand, involved one of the most fundamental of human rights secured by the Constitution, the right to a fair trial. The issue presented was whether the constitutional safeguards securing that right were transgressed by the prosecutor and the Court, taking the entire trial into account from its inception to the very end of the

[8] *State* v. *Pometti*, 12 N. J. 446 at 450 (1953); see also *Starego* v. *Soboliski*, 11 N. J. 29 (1952).

jury's deliberations. The appeal was not intended to flick a few specks of procedural dust, as the prosecutor would intimate. Without over-extending the argument under this point, it is respectfully submitted that an examination of defendant's brief in support of the petition for review by certiorari will amply demonstrate the substantiality of the constitutional question involved herein.

An indication of the reasoning of the Supreme Court of New Jersey, relative to this issue, is contained in *State* v. *Pometti*, 12 N. J. 446 at 450 (1953):[9]

> "(1) An appeal is maintainable as of right under the particular clause of the Constitution only where the record reveals a substantial and not a merely colorable question arising under the Federal or State Constitution that has not been the subject of a conclusive judicial determination. It is sufficient if there be a real and substantial controversy as to whether there has been full recognition of a right, privilege, or immunity granted by the Constitution, Federal or State, to the accused in a criminal case. The assertion of a denial of due process will sustain the appeal unless the claim is palpably insubstantial, i.e., plainly and unmistakably devoid of merit."

The sufficiency or insufficiency of a constitutional question, distinguished, however, from the feigned or frivolous issue, is of no moment when viewed from the jurisdictional aspect of opening the door of the New Jersey Supreme Court. The constitutional mandate opens the door as soon as a cause is determined by the Appellate Division involving a question under the Constitution. Whether the constitutional question is sufficient or insuffi-

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[9] Among other New Jersey decisions on this issue; cf: *Starego* v. *Soboliski*, 11 N. J. 29 at 32 (1952); *Roberts Elect. Inc.* v. *Foundations & Excavations, Inc.*, 5 N. J. 426 at 427 (1950).

cient, however, becomes a matter of moment only after the Supreme Court of New Jersey has entertained the appeal on the merits.

The New Jersey Constitution does not qualify or limit the right of appeal to the Supreme Court of New Jersey when a constitutional question has been determined by the Appellate Division. It does not lay down as prerequisite to such an appeal, that the Supreme Court of New Jersey must make a finding or determination, independently of that in the Appellate Division, that a constitutional question is involved. The rule making power of the Supreme Court of New Jersey as laid down in *Winberry* v. *Salisbury*, 5 N. J. 240 (1950), while superseding conflicting legislation involving court procedure, does not warrant an incursion into the provisions of the Constitution itself.

It is respectfully submitted, therefore, that the finality of the determinations by the Appellate Division involving the constitutional question, cannot be disturbed by the Supreme Court so as to disallow an appeal. Had the Appellate Division failed to determine the constitutional questions, or had the Appellate Division ruled that no constitutional question was involved, then and in that event, petitioner's review by the Supreme Court would have been subject to the Supreme Court's discretion. However, in view of the express determination by the Appellate Division of a cause involving a constitutional question, the constitutional mandate proscribed the Supreme Court's discretion and guaranteed the appeal as of right.

POINT II.

Defendant's constitutional guarantee of a fair trial, embodied in the 14th Amendment, was transgressed by prosecutor and court alike in the trial below.

Of the many ideals which motivate our jurisprudence, none is so far-reaching as that of a fair trial. The dignity of the individual and the sphere of his rights bear a direct correlation with how that ideal is conceived. While the Constitution guarantees the right to a fair trial, that right would remain meaningless were it not to reflect the spirit and the ideal with which it was first envisioned. It is the meaning of "fair trial".

A person accused of a crime has a right to a fair trial in terms of fundamental justice, despite the accusation. The denial of a fair and impartial trial as guaranteed by the 6th Amendment is also a denial of due process of law demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders the trial and conviction for a criminal offense illegal.[10]

The arguments advanced herein are the result of a careful and sincere analysis of the record below. Whether there will be a kinship of understanding and accord with the points espoused will depend, in some measure, on how far the ideal of "fair trial" must be sacrificed for the expediency of the hour. Fundamentally, however, there is a universal acceptance of the meaning of "fair play" which transcends expediency. But if expediency is to be the important consideration, how much less of "fair play" is to be accorded an accused? How far can the prosecutor trans-

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[10] *Baker* v. *Hudspeth*, 129 F. 2d 779, cert. den. 317 U. S. 681, rehearing denied 317 U. S. 711.

gress the normal safeguards in seeking a conviction?[11] It is respectfully submitted that the Courts of New Jersey should not undo the basic concepts that inhere in the meaning of "fair trial".

Was the petitioner afforded a fair trial? Was there an observance of that fundamental fairness essential to the very concept of justice.[12] That is the inquiry, regardless of the strength or compelling character of the evidence.[13]

Your petitioner, Joseph C. Caprio, was not the defendant below. He was a co-defendant tried jointly with his brother Nicholas Caprio. They were charged as joint participants. At first blush such a joinder might appear benign, but it is emphatically stressed that it was such a joinder that provoked the lowering of the bars guarding the right of an accused to a fair trial.[14] It is therefore imperative that all features of that joinder be explored carefully.[15]

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[11] *Cf.* The Freedom of the Trial Judge, 65 Harvard Law Review 1290, J. Wyzanski: "Indeed the usual federal criminal trial is apt to turn on whether the prosecutor has procured its evidence in accordance with the law and is prosecuting it fairly, as on whether the defendant is guilty as charged."

[12] *State* v. *Cooper*, 2 N. J. 542 at 558 (1949).

[13] *State* v. *Cleveland*, 6 N. J. 316 at 320 (1951): "The right of an accused to a fair trial, with the customary safeguards accorded him by our Constitution and our law, is in no degree, impaired or diminished by the strength or compelling character of the evidence against him." See also, *State* v. *Vaszorich*, 13 N. J. 99 at 131 (1953), *Ex Parte Quirin*, 317 U. S. 1.

[14] "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen," *Miller* v. *U. S.*, 120 F. 2d 968 (C. C. A., Kan. 1941).

[15] See 90 A. L. R. 1185 to the effect that joint trials may be justified when the jury is properly instructed concerning the application of the evidence and no prejudice has in fact resulted from trying the defendants jointly.

Paramount considerations of "fair play" would militate against a joint trial. An indictment, numerically prior to the one at bar, had been returned by the Grand Jury of Essex County against the petitioner, individually (R., p. 2). Nevertheless, the prosecutor sought and pressed for trial an indictment charging Joseph and Nicholas jointly. Why, may it be asked, was Nicholas joined as a co-defendant? Here was a 70-year old brother, a pharmacist in the closing years of life. Was his existence such as to warrant the castigation of such a charge?

It is respectfully submitted that the prosecutor, in his zealousness to secure the conviction of the petitioner, sought and moved the joint indictment, rather than the individual indictment, and thus transgressed defendant's constitutional guarantee to a fair trial. That no legal or factual basis subsisted for such a joint charge should have been apparent to the prosecutor. The crime charged was a personal crime, personal to an individual having color of office.[16] The statute was aimed at the person who unlawfully received a fee by color of his own office, and not that of another.

> 2A:105-1: "Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdemeanor."

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[16] Joyce on Indictments, 2d Ed., sec. 584: "It is the general rule that where the offence is of such character that it cannot be committed by two or more persons jointly, it is error in an indictment to charge several persons jointly with the commission"; 2 Hawk P. C., c 25, s. 89: "Where several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstance applicable to each individual severally and not jointly, they must be indicted separately"; Wharton's Criminal Procedure, 9th Ed., sec. 352; Joyce on Indictments, 2d Ed., sec. 584: "Two parties cannot be joined in one indictment for a strictly personal offense, as the practice of medicine without a license, or perjury."

Petitioner's brother, Nicholas, held no office. Could he be charged with the unlawful take of a fee by color of another's office? The legislative proscription is clear; it encompasses only those who hold an office.[17] Thus accepting the plain meaning of the words used in the joint indictment, Nicholas was devoid of the capacity to commit the crime of which he was charged. He could not be charged with the unlawful taking of a fee by virtue of petitioner's office.[18]

Was petitioner's brother indicted jointly upon a theory that he participated in the offense charged and thus became a principal? Such a theory would necessarily involve an unlawful participation, a participation partaking of a *mens rea*. That no factual basis subsisted for such a theory should also have been evident to the prosecutor, insofar as he was fully cognizant of the testimony offered before the Grand Jury. In fact, the prosecutor had the benefit of knowing both sides of the case at that time. There was no intimation that the testimony adduced before the Grand Jury was varied at the trial. Yet the trial court brooked no hesitancy in dismissing the charge against Nicholas, a ruling which amply demonstrates the lack of any factual

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[17] *U. S.* v. *Laudani*, 134 F. (2d) 847 (C. C. A., 3rd Cir., 1943), reversed on other grounds 320 U. S. 543 (1943): "at common law extortion is the taking by color of office * * *. The offense required an official as the perpetrator. * * * Where the common law definition of extortion has been enlarged by statute to include what is ordinarily termed 'blackmail' the offense may be committed by a private individual." See also: 22 Am. Jur. "Extortion," sec. 18, p. 238; Annotation, 4 L. R. A., p. 360; 2 Wharton Crim. Law, 12th Ed., sec. 1904.

[18] *State* v. *Beliveau*, 114 Me. 477, 96 Atl. 779 (Sup. Ct., 1916): "It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the court, from an inspection of the indictment can say that, if all of the facts are true, the defendant is guilty." See also *U. S.* vs. *Dietrick*, 126 Fed. 664 (C. C. A. 8th Cir., 1904), holding that two persons could not in a single count, be charged, one with agreeing to receive a bribe as "a member of Congress" and the other with agreeing to give it.

basis for the joinder of Nicholas on the theory of participation.[19]

Despite the foregoing, the prosecutor sought and pressed for trial the joint indictment at bar. His course of conduct unveiled a strategy and maneuver, calculated to secure the conviction of Joseph. The injurious effects which resulted from such joinder are the gravamen of the proposition that petitioner was deprived of a fair trial. Had petitioner been tried singly, on the other hand, the issues raised herein would never have arisen.

The first and immediate injurious effect of such joinder was to eliminate the value of Nicholas as a witness for the defense. While such joinder did not render Nicholas incompetent to testify,[20] any testimony offered by him would bear the taint of a party, criminally accused.

The rationale of the common law rule, that a prosecutor could not deprive a defendant of the testimony of an innocent witness by joining the latter as a co-defendant,[21] is equally applicable today. The stigma of criminal accusation, the taint of being joined as a co-defendant, both have their effect upon a jury, an effect not easily overcome or dispelled.

In addition, if the innocent witness is joined as a co-defendant, he cannot be compelled to testify. As a party

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[19] It is petitioner's position that he was prejudiced because the prosecutor waited until such time as Nicholas was acquitted, to shift from a theory of joint participation to that of innocent agency.

[20] See N. J. S. 2A:81-1, 2A:81-8. Cf.: The common law rule was that persons jointly indicted and jointly tried were not competent witnesses on behalf of each other, *Little* v. *Arrowsmith*, 16 N. J. L. 221 (Sup. Ct., 1837); *Campbell* v. *Zubriskie*, 8 N. J. Eq. 356 at 471 (Chan., 1850), aff'd 8 N. J. Eq. 738 (E. & A., 1851); 22 C. J. S., p. 1377, § 804.

[21] 16 C. J., p. 686, § 1406; 22 C. J. S., p. 1371, § 801 and cases therein cited.

defendant he can refuse to take the stand, thereby rendering nugatory the effectiveness of court process otherwise available to a defendant. Article 1, paragraph 10 of the New Jersey Constitution guarantees compulsory court process for the accused. Can the prosecutor, under the guise of a joinder, render such court process ineffective?[22]

The court must not be unmindful of the three-cornered aspect of the trial below. Stefanelli had made his incongruous complaint. Petitioner denied the charge. The outcome of the trial then depended in a large measure upon the weight to be accorded to the testimony of Nicholas. But the jury was fully cognizant of Nicholas' previous participation in the trial, jointly accused of extortion. The taint of that accusation followed Nicholas to the stand. The reformist, accused of treason, the banker, accused of embezzlement, the preacher, accused of adultery, each loses in stature when the accusation is weighed in the minds of laymen. Who can say what consideration tipped the judicial scales against the accused? One consideration is certain, however; the petitioner was deprived of "fair play" when his brother Nicholas, an innocent witness, was joined in the trial of this cause.

The trial court, on the other hand, after acquitting the co-defendant, Nicholas, permitted the jury to take the original indictment to the jury room without cautioning them that any reference therein to Nicholas Caprio should be completely ignored. Thus the indictment itself served

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[22] This right, when guaranteed by constitutional provision, is a real, substantive and absolute one which may be exercised or waived by the accused and of which he may not be deprived by the court, jury or legislature, 70 *Corpus Juris*, "Witnesses," sec. 5, p. 35 and cases cited therein. See also: N. J. S. 2A:81-8; *State* v. *Edelman*, 19 N. J. Super. 350 at 357 (App. Div., 1952); Wigmore, Evidence, sec. 2263(2); 58 Amer. Juris., Witnesses, sec. 173; Wharton, Criminal Evidence, sec. 1125; *State* v. *Pitman*, 119 Atl. 438 (Sup. Ct., 1922); 167 A. L. R. 578 n.

as a constant reminder, during the deliberations of the jury, that Nicholas had been criminally accused. The failure of the court to properly instruct and caution the jury in that respect was prejudicial. The court charged (R., pp. 98, 99):

> "Although the indictment was read accurately to you by the Prosecutor at the outset of the trial, I think I shall read it again. It says:"
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> "Although I have again read the indictment to you, you will have it in the jury room with you for further examination."

The name of Nicholas Caprio was not deleted from the reading of the indictment or from the indictment proper when it was given to the jury; neither was the jury cautioned. Thus the stigma of the accusation was associated with the weight of the testimony offered by Nicholas.

The second injurious effect of the joinder of Nicholas as a co-defendant was to enable the prosecutor to introduce evidence binding on Nicholas, yet palpably incompetent as to the petitioner.

When the State's principal witness, Stefanelli, was asked by the prosecutor: "What did you do with the $2,800.00 in cash?", the reply was that he had put it in an envelope, delivered it to Nicholas *and that he told Nick to give it to Joe* (R., p. 32). Such testimony, while admissible against Nicholas Caprio on the theory that it constituted a tacit admission by a party to the action, was patently incompetent as to the petitioner.[23] The statement

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[23] Cf.: Rutgers Law Review, Vol. 7, p. 267, Survey of the Law of N. J. (1951-1952); "So imbued are the prosecutor's staff with zeal to win cases, that evidence plainly inadmissible on the issue of guilt was covertly offered and received on a limited issue, with the full

was alleged to have been made out of petitioner's presence and as such was adulterated with hearsay. The State in its brief before the Appellate Division conceded that the testimony was "technically hearsay," but it argued that regardless of the damaging influence on defendant's case, as maintained, it was entirely competent and properly received. Such argument engaged in equivocation and furnished no exception to the general rule against hearsay.

> "Hearsay testimony is not tolerated in our system of jurisprudence unless it comes within the well-known exceptions to the general rule * * *", *State* v. *De Paola*, 5 N. J. 1 at p. 13 (1950).[24]

The trend of the law in the State of New Jersey has not transpired without the vigorous dissent. The dissent in *State* v. *Mosley*, 102 N. J. L. 94 at 113, (E. & A. 1925) is keyed to the constitutional issue:

> "Moreover, the defendant was not, in my judgment, accorded a fair trial. Much hearsay testimony of a prejudicial and harmful character to the defendant was allowed to come into the cause. It is true that the counsel who appeared for the defendant below offered no objection, either through incompetency or indifference, or both, to such testimony,

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expectation of its use by the jury substantively. The event confirmed this expectation. The Appellate Court's comment on this aspect of the trial exhibits proper judicial restraint. A more forthright condemnation of such calculated misuse of evidence, particularly in the absence of substantive proofs, would not have been without justification. The need for less winning in criminal cases and more zeal in convicting only the guilty might well in some appropriate way and at some appropriate time be impressed on the prosecutors of the State."

[24] The immediate victim of a crime is not a party at the trial of the indictment. See *State* v. *Brady*, 71 N. J. L. 360 (Sup. Ct., 1904); *State* v. *Calabrese*, 99 N. J. L. 312 (Sup. Ct., 1924), aff'd 100 N. J. L. 412 (E. & A., 1924); *State* v. *Centalonza*, 18 N. J. Super. 154 (App. Div., 1952).

but it seems to me that this culpable inertia of counsel did not relieve the judge from a duty, in a case where a defendant is on trial for a capital offense, from protecting him against improper influence being injected into the cause. For this reason alone there should be a new trial."

The dissent in *State* v. *Tune*, 13 N. J. 203 at 235 (1953) is difficult to disagree with in principle:

> "The holding of this case gives the majority protestation that 'In this State our courts are always mindful of the rights of the accused' a hollow ring. The assurance seems doubly hollow in light of the emphasis upon formalism in this case while it has been our boast in all other causes that we have subordinated procedural niceties to decisions on the merits."

It is respectfully submitted that the authorities are in complete accord that the foregoing testimony was incompetent as to Joseph.[25]

In any event, did the court do anything to assist the situation? Basically, it is still the duty of the court to caution the jury as to the competency of the evidence. That

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[25] *Sparf* v. *U. S.*, 156 U. S. 51 (1895), wherein this Court held that declarations of a co-defendant out of the presence of the defendant, Sparf, were in no state of the case competent against Sparf. "Its inadmissibility as to him was apparent"; see Annotation 106 A. L. R. 467; see also *State* v. *Cioffe*, 128 N. J. L. 342 at 351 (Sup. Ct., 1942), where lower court had ruled that such a statement was "certainly not binding on Dugan," but only on Cioffe. "Such a statement," said the Supreme Court, "exhibited due regard for the fact that the evidence was limited to Cioffe"; see also *Suarez* v. *State*, 98 Fla. 42, 115 So. 519 (Sup. Ct., 1928), wherein it was held that the trial court committed error for the reason that the record did not show that the trial court had instructed the jury not to consider certain testimony against N, as evidence against the other defendants, E. S. and B. S.; see also, *State* v. *Hester*, 134 S. E. 885 (Sup. Ct. S. C., 1926); *State* v. *Unger*, 93 N. J. L. 50 at 53 (Sup. Ct., 1919).

is a matter upon which the jury cannot speculate. If the jury is charged, as in the case at bar (R. p. 107): "You are the judges of the credibility of the witnesses and the weight to be given that testimony," then it is incumbent upon the trial judge to advise the jury as to the competency of the evidence. Fundamental concepts of justice and fairness would have dictated that the jury be so advised. How else could the jury be properly guided on its true course. Had they been informed that certain testimony was incompetent, that it was hearsay, that it was not admissible or evidential as to the petitioner, they would have known that they could not speculate as to the weight of that testimony. It would have been removed from all consideration. This was not done.[26]

But proceeding further, when the court acquitted Nicholas at the end of the State's case, it was obligatory upon the court to advise the jury that such testimony should be completely ignored. Since that testimony was admitted solely as to Nicholas, it became completely incompetent after his acquittal for all purposes.

The case of *Brown* v. *State,* 178 So. 153 (Fla. Sup. Ct., 1938), while not on all fours, may be illustrative of the point. The court decided that when the State has charged conspiracy to kidnap and also the substantive offense of kidnapping, and the trial court directed a verdict of not guilty as to the conspiracy counts, the trial court's failure to exclude evidence adduced under the conspiracy counts

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[26] The trial judge should control conduct of trial so that evidence shall be presented honestly, expeditiously and in such form as to be readily understood, *U. S.* v. *Angelo,* 153 F. 2d 247 (C. C. A., N. J. 1946); the imperative duty of the Court is to see that a defendant has a fair trial, *Kinard* v. *U. S.,* 96 F. 2d 522; see also, *Glasser* v. *U. S.,* 315 U. S. 60, *Kretske* v. *U. S.,* 313 U. S. 551.

was prejudicial error, since the direction of verdict rendered all such evidence incompetent.[27]

The case of *Bullock* v. *State*, 65 N. J. L. 557 (E. & A., 1900), is also illustrative. The court held at page 575:

> "Where evidence which is illegal is received by the court in the progress of the trial, it is competent for the court subsequently to exclude such illegal testimony. In such a case no error could be assigned on the reception of the testimony. But the admission of the evidence being error, it must clearly appear that the testimony illegally admitted was so eradicated from the case that its admission could not have injuriously affected the accused. Throckmorton *v.* Holt, 180 U. S. 552, 557."[28]

The court even went one step further in the wrong direction. In commenting on the evidence at the conclusion of the trial, the court, in referring to Stefanelli's testimony, stated:

> "That money he put in an envelope, sealed it and delivered it to Nicholas *for Joseph* * * *" (R., p. 105).

The court actually emphasized, what was concededly, incompetent and hearsay evidence, i. e. *for Joseph*. Thus

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[27] Persons accused of a crime are to be tried upon competent evidence alone and none other, see 22 C. J. S., p. 980, § 641; 16 C. J., p. 562, § 1090; where one is on trial for the crime of conspiracy, the declarations of an alleged co-conspirator who has been acquitted are not admissible against him, see 16 C. J., p. 655, § 1300, and cases therein cited.

[28] See also, *Crawford* v. *U. S.*, 212 U. S. 183 at 203: "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury, it is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment."

the court not only failed to remove incompetent evidence from the jury's consideration, but it embarked on a course of comment which is alien to basic principles of "fair trial."[29] It is respectfully submitted, therefore, that the failure of the court below to control the competency of the evidence submitted for the jury's consideration, deprived the petitioner of a fair trial.

The third injurious effect of the joinder of Nicholas as a co-defendant enabled the prosecutor to shift his position and theory of prosecution to meet the changing temper of the trial.

While the variance encountered in the record between the indictment and the proof may be fatal to the State's case as a matter of law, the subject is approached strictly from the standpoint of deprivation of "fair trial." The indictment charged the co-defendant, Nicholas, with corrupt and unlawful intent. As the trial progressed, the court was compelled to acquit Nicholas for lack of any evidence whatsoever to incriminate him.

Thereafter, the prosecutor advanced a new theory of prosecution. The shift was made to a theory of innocent agency. It was contended that Nicholas was an innocent agent, the conduit through which the unlawful taking was accomplished, a shift from joint participation to innocent agency. If the prosecutor is consistent in his reasoning that such did not constitute a variance, then on what possible ground can he justify the original joinder of Nicholas

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[29] *Andres* v. *U. S.*, 333 U. S. 740 at 765 (1948), *J.* Frankfurter: "The charge is that part of the whole trial which probably exercises the weightiest influence on jurors"; see also, *State* v. *Underdown*, 107 N. J. L. 486 (E. & A., 1930); cf.: *State* v. *Bunk*, 4 N. J. 461 at 477 (1950): "Declaring the law applicable to a case to a jury should be done by the court in such a way as not to leave room for misapprehension or mistake." See also *State* v. *Kapelsohn*, 9 N. J. Super. 177 (App. Div. 1950).

in the indictment. The prosecutor had already had the benefit of a joint trial whereby certain incompetent testimony had been introduced solely for its evidential effect on Nicholas. Yet, after Nicholas was acquitted, no attempt was made by the prosecutor to purge the record of that evidence. Thus, in shifting to a theory of innocent agency, the prosecutor had the benefit of what was behind him. Had he relied upon a theory of innocent agency from the inception, Nicholas could not have been joined as a party. Without that joinder the incompetent evidence could not have been introduced. Was it fair for the prosecutor to disengage from that choice in the middle of the trial and urge a contrary position?

Under such circumstances, was the petitioner confronted with a fair and straightforward charge? In reality, was he not placed in the unorthodox position, to use a metaphor, of having to play a game of cat and mouse. The pyramiding complexities of the theories of prosecution resulting from such a joinder of parties, may, in and of itself, amount to a lack of due process for lack of a proper accusation.[30] Is not the concept of "fair trial" transgressed when the prosecutor arms himself with a progression of legal theories of prosecution,[31] all for the sake of expediency in securing a conviction? Under such circumstances, where do the advantages lie? If there is to be an insistence upon formalism, the prosecutor should not remain immune.

No measure of argument can uproot the plain meaning of the language or the theory employed in the indictment. To recant that position and urge an innocent agency, con-

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[30] *Cole* v. *Arkansas*, 333 U. S. 201 (1948); cf.: *State* v. *Butler*, 107 N. J. L. 91 (E. & A., 1930).

[31] Cf.: *State* v. *Cooper*, 10 N. J. 532 at 567 (1952): "The appellants concede all this but say such modernization does not permit a 'grab bag' type of justice."

stitutes a variance between the charge and the proof. It is respectfully submitted, therefore, that the prosecutor's shift of position from that of joint participation to innocent agency was harmful to the defendant, because had the prosecutor allied himself with a theory of innocent agency from the inception, there would have been no prejudicial joinder of parties. The prosecutor should not be permitted to blow hot and cold. His failure to implicate Nicholas in any unlawful participation of the crime charged could not be used as the basis for shifting his theory of prosecution to that of innocent agency.[22]

The fourth injurious effect of the joinder of Nicholas as a co-defendant was to enable the prosecutor to try the co-defendants as joint participants, acting in concert, so that the acts and declarations of each would be binding on the other.

This feature of the joinder bears a direct relationship to the alleged commission of the crime by the petitioner. It is to be noted that the indictment charged the co-defendants with the unlawful taking of a fee from Stefanelli on May 8, 1952. Stefanelli testified that on May 8th he delivered a sealed envelope to the co-defendant Nicholas (R., pp. 32 and 47).[23] This testimony must be viewed in a light which devoids Nicholas of any knowledge of the alleged transaction, by virtue of the court's ruling (R., pp. 63, 64).

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[22] If it be assumed that the prosecutor adopted a theory of conspiracy, as regards the co-defendant, would not the acquittal of one be a bar to further prosecution of the other on that theory? Cf.: 16 C. J., p. 655, § 1300 and cases therein cited.

[23] Stefanelli testified that he could not remember what he did with the envelope, whether he handed it to Nicholas or put it on the counter. He could only remember "I know I just walked in in a hurry, and I walked out" (R., pp. 47, 48). Whether such delivery, as alleged by Stefanelli, constituted a taking by Nicholas is another matter which was not properly disposed of by the trial court.

Can it be said, therefore, as a matter of law, that the alleged taking by Nicholas was a taking by Joseph? Had the court withheld its ruling in dismissing the charge against Nicholas, the inference, as to whether or not Nicholas was acting in concert with his brother, was for the jury to draw from all the evidence. But the court having dismissed the charge against Nicholas, the issue of concerted action became moot. Thus, the alleged act of Nicholas could not bind the co-defendant Joseph.[34]

During the oral argument before the Appellate Division the prosecutor argued that the crime was complete when the envelope was delivered to Nicholas. The prosecutor, in effect, pursued the same erroneous course laid down by the Trial Court, when it ruled (R., p. 60):

> "It seems to me that the proof demonstrates, or at least requires the inference that Nicholas, in receiving the money, was acting as the agent of Joseph; and when the money was turned over to Nicholas and he accepted it, and what was done later was done in accordance with the agreement; that the jury is entitled to infer that payment to Nicholas was payment to Joseph."

Did the alleged receipt of the envelope by Nicholas complete the crime? The statute in question defines the crime as the unlawful taking of a fee by a person holding office. Nicholas held no office and therefore could not accomplish the taking proscribed by the statute. Thus, it was incumbent upon the State to show, in addition to the alleged delivery to Nicholas, that the petitioner received the money. That fact had to be established either by direct or circum-

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[34] On a charge of a joint crime, the prosecutor cannot rely upon the separate acts of each defendant. See 16 C. J., p. 853, sec. 2154½; Joyce on Indictments, 2d Ed., sec. 579; *Sampson* v. *State*, 83 Tex. Cr. R. 594, 204 S. W. 324 (Ct. of Crim. App., 1918).

stantial evidence. Such a deficiency of proof could not be supplied by the arbitrary argument that a taking by Nicholas constituted a taking by the petitioner.

To use an illustration, if one were directed to place the money in the bough of a tree, can it be said that the crime is complete as soon as the money is so placed in the tree? It is respectfully submitted that the crime is not complete. Circumstances must prevail, which in addition to the foregoing, give rise to a legitimate inference that the officeholder did take the money. That is the proscription of the statute, whether wise or unwise. If the tree, together with the money, had burned to the ground, the crime could not be accomplished. Thus, the alleged delivery of the envelope to Nicholas, in and of itself, did not complete the crime. The court did not advise the jury, on this crucial phase of the case, that in addition to the alleged delivery of the envelope to Nicholas, the State had to show that petitioner, himself, received that envelope. Since the State depended upon circumstantial evidence to supply this proof, the court was obliged to advise the jury that the circumstances on which the State relied had to be "consistent with defendant's guilt and inconsistent with any rational theory of innocence."[35]

To pursue the point further, the court relied upon circumstantial evidence in sending petitioner's case to the jury. There was no direct evidence in the case that petitioner had taken the alleged envelope on May 8, 1952, the date laid in the indictment. Whether such an inference was or was not to be drawn was not broached by the court in its charge. Under such circumstances, did the jury have any way of knowing that if any rational inference arose

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[35] See *State* v. *Fox*, 12 N. J. Super. 132 (App. Div., 1951); *State* v. *Boyd*, 137 N. J. L. 23 (Sup. Ct., 1945).

that petitioner had not taken the envelope containing the money on May 8th, he should be found not guilty of the charge?

Strangely enough, the court had previously ruled (D60a-38):

> "Other portions of the testimony on that point support the other inference, that Joseph Caprio had not received the money that was in the envelope at that time."

Fundamental fairness dictated that the jury should have been advised concerning these vital issues. Basic comment on the use and value of circumstantial evidence and the propriety of the inference inconsistent with any possible theory of innocence were essential to a fair trial in the case at bar. It is no answer to argue that the court is under no duty to charge, unless a request is made.[36] In a criminal trial it is always the right and often the duty of the judge to comment upon the evidence.[37] In the case at bar, however, the court having embarked on a course of charging the jury, was perforce charged with the duty of instructing the jury correctly. The court having undertaken the task, the court was obliged to see it through. Thus, an overriding duty was imposed upon the court, the duty of instructing the jury correctly, in accordance with the facts and the law.

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[36] *State* v. *Capawanna*, 118 N. J. L. 429 (Sup. Ct., 1937), aff'd 119 N. J. L. 337 (E. & A., 1938); Cf.: *Kinard* v. *U. S.*, 96 F. 2d 522, 523, and *Kreiner* v. *U. S.*, 11 F. 2d 722, 731, to the effect that in a criminal case, it is the duty of the Court to instruct on all essential questions of law, whether requested or not. See also, *Miller* v. *U. S. (supra)*.

[37] In a criminal trial it is always the right and often the duty of the judge to comment upon the evidence. See *State* v. *Fuersten*, 103 N. J. L. 383 at 388 (E. & A., 1926); *State* v. *Lyons*, 99 N. J. L. 301 at 303 (E. & A., 1923); *State* v. *Schuyler*, 75 N. J. L. 487 at 489 (E. & A., 1907); *State* v. *Randall*, 95 N. J. L. 452 at 456 (E. & A., 1920); *State* v. *Dragone*, 99 N. J. L. 144 (E. & A., 1923).

In this regard the case of *State* v. *Kapelsohn*, 9 N. J. Super. 177 (App. Div. 1950) bears consideration. In that case the trial court charged the jury in terms of "presumptive evidence", but failed to define the statutory presumption or state that it could be rebutted. The Appellate Division held at page 181:

> "Assuming, however, that the court was at liberty to refer to it in its charge, it seems to us that, having done so, it was fairly incumbent upon it to delimit its effect and clearly set forth the controverted issue for the jury's determination upon the evidence in the cause."

The court stated that it was satisfied from a reading of the charge in its entirety "that this determinative issue was not adequately submitted to the jury, which may well have been misled into giving improper weight to the presumption."

Thus, was it fair to submit the case at bar to the jury without first offering them such rudimentary advice concerning the inferences involved and the application of same. It is respectfully submitted that the trial court faltered in this regard in preserving defendant's constitutional guarantee to a fair trial.

The fifth injurious effect of the joinder of Nicholas Caprio as a co-defendant enabled the prosecutor to secure a conviction by confusion.[38]

The joinder of the co-defendants in the same indictment had a devastating effect upon the jury in the light of the

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[38] Cf.: *J.* Jackson in *Krulewitch* v. *U. S.*, 336 U. S. 440 at 453 (1949): "As is well recognized, risk of confusion and hence judicial responsibility is greatest in conspiracy cases."

court's charge. The court charged that the jury would have the original indictment in the jury room for further examination. No accompanying cautionary note was made in the minds of the jury, that any reference in the indictment to Nicholas Caprio, the acquitted co-defendant, should be ignored and removed from the jury's consideration of that indictment. The name of Nicholas Caprio was not removed from the basic charge.

An examination of the indictment will indicate, that by a fortuitous juxtaposition of words, the name, "Nicholas Caprio," immediately precedes the words, "unlawfully did receive and take" (R., p. 1). Since the jury had not been charged to ignore the name "Nicholas Caprio" in their consideration of the indictment, the jury may well have applied a false yardstick in gauging the guilt of the defendant. It is probable, or at least possible, that the jury could have found that the alleged taking by Nicholas was equivalent to a taking by petitioner. The jury, it must be assumed, in deliberating its verdict, considered the charge or indictment in its entirety. In fact, they were obliged to do so, in view of the court's failure to caution otherwise. The jury may have rationalized that if there were a taking by either the petitioner or Nicholas, there was a taking as charged in the indictment and therefore had to find that Joseph was guilty. The jury may also have concluded that the taking by petitioner was accomplished by Nicholas. Whatever the rationalization of that verdict, the fact remains that the name of Nicholas Caprio was not removed from the indictment. While it is true that the jury knew that they could not convict Nicholas Caprio because of his acquittal, his name, appearing as it did in the charge before the words, "did receive and take", may have been the con-

sideration that moved the jury in finding petitioner guilty. The possibility of mistake is not foreign.[39]

Nor was the failure of the court to properly instruct the jury, when the indictment was submitted to it for further examination, rectified by any other portion of the charge.[40] Rather, the charge of the court served to magnify the impropriety of failing to limit the indictment to the petitioner alone. The court, after instructing the jury that the indictment constituted the *charge* (R., p. 101) proceeded to instruct in terms of the *charge*, without proper cautionary direction concerning Nicholas Caprio, named therein.

> "* * * of the truth of the *charge*" (R., p. 101).
> "* * * of the truth of the *charge*" (R., p. 101).
> "* * * his guilt or innocence of the *charge*" (R., p. 99).
> "* * * since the State has made this *charge*" (R., p. 100).

The court informed the jury that "an indictment, under our law, is simply a *charge*" (R., p. 101) and that the jury would "have it in the jury room for further examination" (R., p. 99).

It is apparent that in accordance with the court's pronouncement, the indictment was brought into the jury

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[39] Cf.: *Little* v. *U. S.*, 73 F. 2d 861, 866: "But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict." See also, *Crawford* v. *U. S.*, 212 U. S. 183, 203.

[40] The court advised the jury that the indictment had been dismissed as to Nicholas Caprio (R., p. 99). Such an informative remark, however, did not cure the lack of a positive direction to the jury to ignore the name of Nicholas Caprio in the indictment submitted to them, *State* v. *Erie R. R. Co.*, 84 N. J. L. 661 (E. & A., 1913); *State* v. *Lang*, 87 N. J. L. 508 (E. & A., 1915).

room.[41] Was the jury properly equipped to render a verdict? The indictment still read that Joseph C. Caprio and Nicholas Caprio did the taking. Is it repugnant to a reasonable rationalization to say that the jury found a vicarious taking, because of the wording contained in the indictment? The possibility, at least, exists and therein lies the deprivation of "fair trial."

Aggravating the five injurious effects caused by the joinder, was the undue weight imparted by the court to the testimony of the State's witness, Stefanelli.

It is respectfully submitted that the State's proof, if believed, yield to the crime of bribery, rather than extortion.[42] Stefanelli, according to his own testimony, alleged that he solicited a favor. He did not intimate that he was oppressed, coerced or threatened in any manner. In view of the holding of the Supreme Court in *State* v. *Weleck*, 10 N. J. 355 at 371 (1952) to the effect that our extortion stat-

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[41] Cf.: *State* v. *Costa*, 11 N. J. 239 at 252 (1953): "The observation that 'a thing in writing carries particularly with the layman, a weight of its own * * * (and is) a present and constant reminder to the jury of its contents' and '* * * shears the balance of the oral testimony in the case of the weight it would otherwise have.' *State* v. *Cleveland, supra*, is particularly appropriate in the circumstances of this case. We cannot escape the conviction that the indictments very probably constituted 'the fulcrum upon which the verdict turned'. *Springer* v. *Lamow*, 108 N. J. L. 68 (Sup. Ct., 1931). The manifest wrong and injury so clearly done Costa by their admission into evidence fully supports the Appellate Division's reversal of the conviction on that ground. See *State* v. *Young*, 93 N. J. L. 396 at 403 (opinion following reargument) (E. & A., 1919)."

[42] Cf.: N. J. S. 2A:93-4, 2A:93-6, statutory definitions of bribery; 11 C. J. S., "Bribery," p. 841; Black's Law Dictionary, "Extortion"; *U. S.* v. *Daniels*, 17 F. 2d 339 (C. C. A. 9th, 1927), cert. den. 274 U. S. 744; *U. S.* v. *Harvard*, 43 F. 376 (D. C., 1890); 35 C. J. S., "Extortion", p. 300; Burdick, Law of Crimes (1949), Vol. 1, sec. 275, p. 395; *State* v. *Ellis*, 33 N. J. L. 102 (Sup. Ct., 1868); *State* v. *Merkel*, 82 N. J. L. 172 (Supr. Ct., 1912), reversed on other grounds, 83 N. J. L. 677 (E. & A., 1912); *Kirby* v. *State*, 57 N. J. L. 320 (Sup. Ct., 1894); *State* v. *Barts*, 132 N. J. L. 74 (Sup. Ct., 1944), aff'd 132 N. J. L. 420 (E. & A., 1945).

ute must be construed in the light of the common law offense, it was technically incorrect to charge extortion.

A conviction for a crime not proved, cannot be sustained merely because the evidence, if believed, would prove another crime, not charged. This proposition rests upon due process of law, see *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948), as well as the constitutional right to indictment and to be informed of the nature of the charge. Cf: *State* v. *Butler,* 107 N. J. L. 91 (E. & A., 1930).

However, if statutory extortion is construed to be confined simply to an unlawful taking by virtue of an office, some misapprehension may have existed in the minds of the jury. To the laymen comprising the jury, extortion had a well-known meaning,[43] a meaning which would place Stefanelli in a more favorable position, respecting the weight of his testimony. He would testify with the semblance of a person oppressed, coerced or threatened. The record will indicate, however, that Stefanelli, if believed, was rather the solicitor of the alleged crime, participating therein as an accomplice. As an accomplice, Stefanelli's testimony should have been regarded with suspicion and accepted only after careful scrutiny.[44] Was the jury so advised?

In short a public official was here convicted solely upon the testimony of an alleged briber. It is well settled that the testimony of an accomplice (and such was Stefanelli on his own testimony) should be taken cautiously, for obviously the witness is testifying to avoid a criminal liability of which he is inescapably guilty.[45]

Did the court properly instruct the jury that they should regard the testimony of an accomplice who testifies

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[43] The court gave added impetus to that meaning when it referred to the crime "• • • which is commonly called extortion" (R., p. 98).

[44] *State* v. *Edelman (supra).*

[45] Cf.: 16 C. J., 697; *State* v. *Hogan,* 13 N. J. Mis. 117 (Sup. Ct., 1935), aff'd 115 N. J. L. 531 (E. & A., 1935); *State* v. *Edelman,* 19 N. J. Super. 350 (App. Div., 1952).

for the State with suspicion and should accept it as true only after careful scrutiny.[46] If anything, the court's comment respecting Stefanelli's testimony, added a special extra-judicial weight to it.[47] The court stated (R., p. 108).

> "Now in approaching your study of the facts and in appraising the evidence, it is proper also for you to ask yourselves whether it is likely, if a transaction of this did take place, you would expect to find many witnesses present."

It is a matter of common knowledge that transactions of that type are not the subject matter of public exhibition. The inference, therefore, is inescapable, that the testimony of Stefanelli could be relied upon, despite lack of corroboration and careful scrutiny. The pendulum of "fair play" had indeed swung to the other extreme.

Conclusion.

For the reasons heretofore urged, it is respectfully submitted that petitioner's constitutional guarantee to a fair trial was transgressed by prosecutor and court alike. He was deprived of an appeal to the Supreme Court of New Jersey to test that right on the merits. A wholesome application of justice, attuned to fair play, requires a "*venire de novo.*" The end result cannot be seized upon as justifying the means, because the means employed, whether fair or unfair, are in themselves the proper subjects of judicial scrutiny.

Had the petitioner been tried singly, as the fact and law warranted, the issues presented herein would not have arisen. Had the petitioner been tried singly there would have been substantial fairness, in contrast to that afforded

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[46] *State* v. *Edelman*, 19 N. J. Super. 350 (App. Div., 1952).

[47] Cf.: *State* v. *Holt*, 128 N. J. L. 599 (Sup. Ct., 1942).

him under the indictment at bar. The joinder of Nicholas Caprio as a co-defendant was not "fair play", either from a factual or legal standpoint. Manifest injury and prejudice accompanied the defendant from the return of the joint indictment to the very end of the jury's deliberations.[48] It is not amiss, under these circumstances to appeal to this Court for a trial free from the atmosphere and injury caused by the ill-calculated joinder of an innocent co-defendant.

This brief has presented six distinct injurious effects sustained by the defendant in the trial at bar. It is respectfully submitted that each one involved a substantial deprivation of "fair play." However, without weighing the relative prejudice sustained by the defendant under each, it must be noted that the cumulative harmful effect of all six, taken in conjunction with one another, lend an added impact to cherished concepts of a fair trial.

It is respectfully submitted, in conclusion, that the decisions of the Supreme Court and Superior Court, Appellate Division of the State of New Jersey, involving the questions presented in the petition, are not in conformity with the provisions of the United States Constitution respecting "due process" and "the equal protection of the laws" as guaranteed therein and are not in conformity with the provisions of the Constitution of the State of New Jersey, and that said courts did decide constitutional questions of substance contrary to the decisions of this court.

Respectfully submitted,

Ralph G. Mesce,
Counsel for Petitioner.

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[48] *Rex* v. *Gibbins*, 82 J. P. (Eng.), 287, 13 Cr. App. Rep. 134 (1918): "If it appeared to the court that a miscarriage of justice had resulted from the prisoners being tried together, it would quash the conviction."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 619.

JOSEPH C. CAPRIO,
Petitioner,

vs.

THE STATE OF NEW JERSEY.
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF OPPOSING PETITION FOR CERTIORARI.

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IN THE

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OCTOBER TERM, 1953

No. 619.

JOSEPH C. CAPRIO,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Reference to Official Report of Opinion Delivered in the Court below.(*)

The opinion of the Supreme Court of New Jersey, the court immediately below, wherein the appeal of petitioner to that court from the Superior Court of New Jersey, Appellate Division, was dismissed, and certification by that court to the Appellate Division was denied, is officially reported in *14 N. J. 64* (R. 157-158); and the opinion of the Appellate Division, while not officially reported, is to be found in R. 146-152.

(*) Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the court below.

II.

Counter-statement Concerning Jurisdiction.

Counsel for petitioner states (B. p. 4), without any elaboration, that the jurisdiction of this Court is invoked under Title 28 U. S. C. A. Sec. 1257(3), and under the rights, privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States, and under the Constitution of the State of New Jersey, Art. I, Pars. 1 and 10; and Art. VI. Sec. V, Par. 1(a).

We respectfully submit that the decisions of the New Jersey Supreme Court and of the Superior Court of New Jersey, Appellate Division, in this case involving the questions presented in the petition are in conformity with the provisions of the Federal Constitution(1) respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and that the said courts did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decisions of the courts below.

III.

Counter-statement of the Case.

Joseph C. Caprio, hereinafter referred to as the petitioner, was tried and convicted on February 11, 1953, in the

(1) Constitution of the United States, Amendment XIV, Section 1.

Essex County Court, before Honorable John J. Francis and a jury, of the crime of extortion in violation of *N. J. S. 2A:105-1.*[2]

The indictment was against two defendants, this petitioner Joseph C. Caprio, and Nicholas Caprio, his brother.

It was in two counts; the first count charging that on May 8, 1952, at Belleville, Essex County, Joseph C. Caprio, being a public officer of the City of Newark, to wit, a member of the Newark Board of Adjustment, and Nicholas Caprio, did unlawfully and corruptly receive and take, by color of the office of said Joseph C. Caprio, from Ernest Stefanelli the sum of $2,800 as a "fee" not allowed by law for the performance of the official duties of said Joseph C. Caprio; and the second count charging the crime in the identical language of the first count, except that the said sum of money was received and taken as a "reward." (R. 1-2).

At the end of the State's case, the court directed an acquittal as to the defendant Nicholas Caprio for insufficiency of evidence for submission of the case to the jury as to him, and the trial proceeded and the case was submitted to the jury as to this petitioner Joseph C. Caprio.

Following conviction, on February 25, 1953, petitioner was sentenced to the New Jersey State Prison for a term of 2 to 3 years and to pay a fine of $1,000.[3]

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(2) *N. J. S. 2A:105-1* provides:

"Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdemeanor."

(3) N. J. S. 2A:85-7 provides:

"Any person found guilty of a crime which by any statute is declared to be a misdemeanor, and for which no punishment is specially provided, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 3 years, or both."

Petitioner took an appeal to the Superior Court of New Jersey, Appellate Division, allowed by law as a matter of right, and that court affirmed the judgment of conviction. (Opinion not officially reported; see R. pp. 146-152).

In his appeal before the Appellate Division, petitioner made the claim that he had been denied a "fair trial" embraced within the due process clause of the 14th Amendment to the Federal Constitution, and in support of such claim he contended that the joinder of petitioner with his brother in the same indictment had the following injurious effects; namely, (1) it tended to "eliminate" the value of the brother's testimony as a witness for the defense, and "any testimony offered by him would bear the taint of a party, criminally accused;" (2) it enabled the State to submit evidence that was binding upon Nicholas but incompetent against the petitioner Joseph; (3) it enabled the State to "shift" its position from one charging Nicholas with corrupt and unlawful intent to one of innocent agency; (4) it enabled the State to prosecute both defendants as joint participants, acting in concert, thereby making the acts and declarations of one binding upon the other; and (5) it enabled the State to secure a conviction by "confusion." He claimed, further, that the alleged injurious effects caused by the joinder in the indictment were aggravated by the "undue weight" given by the court to Stefanelli's testimony in its charge to the jury.

After the affirmance of conviction by the Appellate Division, petitioner took an appeal to the Supreme Court of New Jersey, purportedly by virtue of the provision in the New Jersey Constitution which allows an appeal from

the Appellate Division when a question arising under the Federal or State Constitution is involved.(4)

The State moved to dismiss the appeal upon the ground that the specific grounds advanced in support of the claim of denial of a "fair trial" were ordinary practice questions to be resolved by application of accepted principles and rules of practice and procedure, and that there was not presented a constitutional question of substance sufficient to invoke the provision of the State Constitution, Art. VI, Sec. V, Par. 1(a) referred to, but that petitioner should have applied for certification to the Appellate Division, which was a matter of discretion.(5)

The State's motion for dismissal of the appeal was withheld until final argument, held on December 14, 1953.

At the final argument, petitioner's counsel was allowed extended time in which to present his contentions as to why the Court should entertain jurisdiction on constitutional grounds, and after careful and full consideration, the Supreme Court concluded that "no constitutional question is presented under any of the six points raised", and that none of them were deemed "worthy of granting of certification," as requested in the answer to the State's motion to dismiss.

---

(4) Article VI, Sec. V, Par. 1(a) of the New Jersey Constitution provides:
"Appeals may be taken to the Supreme Court:
"In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State."
Supreme Court *Rule 1:2-1(a)* is identical in language.

(5) New Jersey Supreme Court *Rule 1:10-2* provides that, "Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor. * * *"
The Rule proceeds to give five specific examples indicating the character of reasons which will be considered, not applicable to the questions raised before the Appellate Division in the instant case.

The New Jersey Supreme Court granted the State's motion to dismiss the appeal, and it denied the appellant's application for certification.

Petitioner now petitions this Honorable Court for a writ of certiorari to review the determination of the Supreme Court of New Jersey, and the judgment of the Appellate Division of the Superior Court of New Jersey.

IV.

Facts of the Case.

It was stipulated prior to trial that petitioner Joseph C. Caprio had been duly appointed to the Newark Board of Adjustment by resolution of the Newark City Commission on December 28, 1950 for a term beginning January 1, 1951 to December 31, 1955. (Stipulation No. 7, Ex. S-1, R. 112-22; R. 14-16). It was further stipulated that the annual salary of each member of the Board was $3,100 (Stipulation C, Ex. S-1, R. 113-26).

The proofs of the State established the following facts.

The complaining witness, Ernest Stefanelli, for the State, testified that he was a distant cousin of the Caprios (R. 16-11); that in March, 1952, he conducted two gasoline stations in Belleville, one at 119 Franklin Street, and the other at Greylock Parkway and Washington Avenue; and that he also conducted a mason material business at the Franklin Street address (R. 15-30 to 16-8). He testified that Nicholas Caprio, petitioner's brother, conducted a drug store at the corner of Franklin Street and North Belmont Avenue, distant about 200 feet and located "about diagonally across the street" from his Franklin Street gasoline station (R. 16-27 to 34).

In March, 1952, Stefanelli became interested in the purchase of property known as 263-269 Heller Parkway, Newark, as a prospective site for a gasoline station. The property was on the border line between Newark and Belleville, with a frontage of 100 feet in Newark and about 25 feet in Belleville (R. 17-10 to 18). He contracted to buy the property for $30,000 upon condition that he would obtain municipal permits for the erection and conduct of a gasoline station thereon (R. 41-16; 42-36).

On March 28, 1952, Stefanelli filed an application with the Newark Board of Adjustment for a variance from the City Ordinance (R. 17-24; Ex. S-9, R. 114-116).

On April 24, 1952, a hearing was had on Stefanelli's application before the Newark Board of Adjustment, at which he appeared with counsel (R. 17-38 to 18-8).

Petitioner Joseph C. Caprio participated at the hearing as a member of the Board (R. 18-9). Decision by the Board was reserved pending submission of a traffic report (Ex. S-10, R. 130-14).

Stefanelli testified that, "not too long" and "within a week" after the Board's hearing of April 24th, he went to see petitioner at petitioner's home at 26 Sixth Avenue, Newark (R. 19-12 to 24); that he drove his car and he first picked up Nicholas Caprio at the latter's drug store (R. 19-24 to 20-5); and that on the way to see the petitioner Stefanelli drove past the Heller Parkway property and he said to Nicholas, "I wanted to see if Joe could help me out with the permit," (R. 20-17).

Stefanelli stated that he knew Nicholas better than Joseph Caprio; that he rarely saw Joseph except at wakes

(R. 16-15), while Nicholas was a regular customer at his gas station (R. 16-35).

Following were the occurrences at Joseph's home when Stefanelli called on him with Nicholas.

Nicholas rang the bell; Joseph appeared, and Nicholas said to him, "Joe, this is Cousin Ernest. See if you can't help him out to get a permit on Heller Parkway, on the ground he bought," (R. 20-30).

Petitioner led Stefanelli and Nicholas upstairs to petitioner's living quarters, and Stefanelli had the following conversation with petitioner (R. 21-38 to 22-35):

> "A. Well, I said, 'Joe, is there any way you could help me out to get a permit for the gasoline station?'
>
> And I told him where the ground was.
>
> He said, 'You don't get them things for nothing, Ernest.'
>
> I said, 'What do you mean?'
>
> So, he said, 'Well, it will cost you that much money.'
>
> So I said, 'How much?'
>
> And he told me.
>
> I said, 'I can't afford that kind of money. I haven't got it.'
>
> Q. Just a moment please. Excuse me for interrupting you there, Mr. Stefanelli, but you said that Joe told you how much. How much did he say? A. Five thousand, first off.
>
> Q. $5,000? And when Joseph Caprio said $5,000, what did you say? A. I said, 'I haven't got that kind of money, Joe. I can't afford it.'
>
> Q. Did Joe say anything further? A. He said, 'Four thousand; my thousand will come back to you.'
>
> Q. Joseph Caprio said, 'Four thousand; my thousand will come back to you?' A. That's right.

Q. Did he say anything more about that one thousand that was going to come back to you as to why it would come back to you, for instance? A. 'Being you are a cousin, it will come back to you.'

Q. What did you say? A. I said, 'Well, I still can't afford it.'

Q. All right. Was there any further conversation between you at that time? A. I said, 'If I need you, I will be back.'

Q. All right. And then did you leave? A. Yes, I left."

Thereafter, "About a week and a half" after his conversation with petitioner above referred to, Stefanelli had another conversation with petitioner in the rear of Nicholas's drug store (R. 24-38 to 25-6), under the following circumstances.

Nicholas came to Stefanelli's gas station and told him that petitioner wanted to see him at the drug store (R. 25-37 to 26-13). Nicholas left and he returned "about an hour and a half to two hours later," saying, "Joe is over there still waiting for you, Ernest," and Stefanelli went to Nicholas's drug store where he saw the petitioner (R. 26-14 to 20). Petitioner "asked me to go in the back; he wanted to speak to me," (R. 26-25). While Nicholas was taking care of customers in the drug store, petitioner led Stefanelli into the "back room," described as the "kitchen," (R. 27-12 to 20).

Following was Stefanelli's testimony as to his conversation with petitioner on that occasion (R. 27-28-30):

"A. Joe said to me, 'What are you going to do about the permit?'

I said, 'What could I do?'

He said, 'Do you want it, or don't you want it?'

I said, 'Sure, I want it.'

So he asked me how much it was worth.

I said, 'I don't know.'

So he said, 'Is it worth three thousand to you?'

I said, 'Joe, I can't afford that kind of money.'

So he said, 'What is it worth to you?'

So I said, 'I don't know, but it ain't worth that kind of money.'

Q. Was there any further conversation? A. So he said, 'How about twenty-eight hundred?'

I said, 'I don't know.' So I said, 'I will let you know.'

He said, 'I have got to know now.'

Q. All right, anything else? A. So he said, 'Twenty-eight hundred.' He said, 'Let it go at that.'

Q. What did you say? A. So I said, 'Well, what could I do?' So we let it go at that. So we made a go at that.

Q. You made a go at that? A. At the twenty-eight hundred.

The Court: Well, what did you say?

The Witness: So he said, 'As far as the money, don't worry about it.'

The Court: No, when you said, 'We made a go at that;' when he said, 'Twenty-eight hundred dollars,' what did you say?

The Witness: I said, 'O.K.'

Q. Was there any further conversation between you and Joseph Caprio with reference to the twenty-eight hundred dollars? A. He said, 'Put it in an envelope, no hurry about it, and leave it here to Nick,' which I did."

Stefanelli then proceeded to raise the $2,800, saying, "it had to be in cash. I couldn't have no check" (R. 31-18), "Because Caprio told me it had to be cash" (R. 31-25).

On May 8, 1952, Stefanelli sent an employee, Jack B. Franzi, who managed the Washington Avenue gas station, to the bank and had his check for $1,000 cashed which he got in $100 bills (R. 29-38; R. 55-7). He borrowed $1,000 from Michael Mascera, a general contractor and long-time friend, which was given him in $100 bills (R. 30-38; 56-14 to 26). The balance of $800 he got "out of my three places, I got together" (R. 31-5). He took the $2,800 which was "Mostly all hundred dollar bills" (R. 48-13), about "twenty" of them (R. 48-17), the rest being in "fifties and twenties" (R. 48-18); he placed the cash "in one of my bill heads—letter heads—envelopes with my name on" (R. 47-30), the envelope being "A big one" (R. 47-32); he sealed the envelope and brought it to the drug store and gave it to Nicholas Caprio personally, saying, "Here, Nick, give this to Joe" (R. 47-36 to 39).

Petitioner delivered the envelope with the money to Nicholas on May 8th, "Around twelve o'clock," at "Noon" of that day (R. 48-25, 26), saying, "I just walked in in a hurry, and I walked out" (R. 48-7).

There was a second hearing on Stefanelli's application before the Board of Adjustment on the evening of that day, May 8th. The Board recommended the granting of a variance for a period of eight years on motion of petitioner (Ex. S-10, R. 131).

The matter came up before the Newark City Commission for final determination on May 14th, 1952, and the Commission disapproved the Board's recommendation (Ex. S-12, R. 133).

Immediately following the disapproval of the City Commission, on May 14th, the petitioner drove to "Stefanelli's

Franklin Street gas station." Petitioner "pulled up to the driveway, right in the street, and tooted the horn at me" (R. 35-38). Stefanelli went over to petitioner's car; petitioner was alone in the car; and the following conversation ensued between them (R. 34-22):

> "Q. What was the conversation that you had with Joseph Caprio? A. He said, 'Don't worry about it, Ernest.' He said, 'I come over here to get the money now. I hadn't got it yet.'
>
> Q. Did Joseph Caprio say anything else to you at that time? A. I don't believe so—oh, he said he didn't get it yet.
>
> Q. He said he didn't get the money yet? A. That's right.
>
> Q. Did Joseph Caprio say anything else to you about the money? A. He said he was going to get it then.
>
> Q. And this was after you had been before the City Commission? A. That's right."

And at R. 35-12:

> "Q. I want you to tell us, Mr. Stefanelli, all of the conversation between you and Joseph Caprio on that occasion. A. He said, 'Don't worry about it.' He said 'I am just going over and get the money now. I haven't got it yet.' He didn't get it yet."

And at R. 36-29:

> "A. Well he told me that the other party didn't get the money."

And at R. 36-40:

> "Q. Did he say who the other party was? A. Yes.
>
> Q. Whom did he say? A. Ralph.
>
> Q. Did he say anything more, other than Ralph? A. No.

Q. Just what did he say about Ralph? A. He said he didn't get the money."

Subsequently, at a meeting of the Newark City Commission on June 11, 1952, the Commission reversed itself and adopted a resolution approving of the Board's recommendation for the variance (R. 38-32 to 39-33; Ex. S-14, R. 134-135).

On cross examination, Stefanelli testified (R. 52-38):

"Q. The suggestion of twenty-eight hundred was not yours? A. No.
Q. You say it was his? A. Yes."

The State called Jack B. Franzi, manager of Stefanelli's Washington Avenue gas station, and he testified to going to the bank on May 8th and having Stefanelli's check for $1,000 cashed and giving the money to Stefanelli, all in $100 bills (R. 54-39 to 55-32).

The State also called Michael Mascera, who testified to lending to Stefanelli $1,000 on May 8th and giving Stefanelli the money in $100 bills (R. 56).

At the close of the State's case, the Court denied petitioner's motion for direction of acquittal (R. 59-26 to 61-12).

The Court granted the motion for direction of acquittal of petitioner Nicholas Caprio upon the ground of insufficiency of proof for submission of the case to the jury (R. 61-16 to 64-35).

The petitioner Joseph Caprio took the stand in his own behalf. He testified that he was a member of the Newark Board of Adjustment, as well as Chief Clerk of the Hudson County District Court, Part Five, known as the Kearny

District Court, since 1940, and that prior thereto he had been Sergeant-at-Arms in said court. As to his political activities he testified to being an active member of the Essex County Republican Committee and member of the Republican Executive Committee of the First Ward, Newark (R. 65).

He specifically denied the crime laid in the indictment. While he "understood" there was some distant relationship between him and Stefanelli, he said they were "practically strangers" (R. 66-5 to 16). He admitted that his brother, Nicholas, brought Stefanelli to his home in the early part of 1952, at which time Stefanelli told him of the purchase of the Heller Parkway property, that he wanted to convert the property into a gas station, and that he wanted some advice from petitioner as to what the procedure was in getting a permit, and that petitioner advised him to get a lawyer, an architect and to file his plans and application with the Newark Board of Adjustment, and that he, Caprio, would do all in his power to help him in the matter. Petitioner said that this conversation at his home was *prior* to the filing of the application by Stefanelli for the variance with the Board of Adjustment. Petitioner specifically denied ever seeing Stefanelli again after that meeting in his home, except at the meetings of the Board of Adjustment of April 24th and May 8th; and he denied ever asking for or receiving $2,800 for the performance of his duties.

Nicholas Caprio testified for his brother, the petitioner. He admitted taking Stefanelli to petitioner's home and he corroborated the petitioner's version of what took place on that occasion. He denied that Stefanelli had been to his

drug store with the petitioner, or that Stefanelli had left with him an envelope for the petitioner. Petitioner called two character witnesses.

V.

Summary of the Argument.

We respectfully submit:

First: The Supreme Court of New Jersey properly determined that the grounds urged by petitioner in support of the constitutional issue affecting his right to a fair trial did not present a constitutional question of substance as to entitle him to an appeal to that Court from the Appellate Division of the Superior Court as a matter of right, under the provisions of Article VI, Section V, Paragraph 1(a) of the New Jersey Constitution.

Second: Petitioner was not denied the right to a fair trial as embraced within the due process clause of the Fourteenth Amendment to the Federal Constitution by either the Prosecutor or the Court.

VI.

THE ARGUMENT.(*)

POINT ONE.

The Supreme Court of New Jersey properly determined that the grounds urged by petitioner in support of the constitutional issue affecting his right to a fair trial did not present a constitutional question of substance as to entitle him to an appeal as a matter of right within the purview of Article VI, Section V, Paragraph 1(a) of the New Jersey Constitution.

In his appeal to the Appellate Division of the Superior Court of New Jersey, petitioner made the contention that he was denied a fair trial embraced within the due process clause of the 14th Amendment to the Federal Constitution. The basis for such contention was that he was improperly joined as party defendant in the indictment with his brother Nicholas, and that such joinder had the following injurious effects at the trial; namely, (1) it tended to eliminate the value of his brother's evidence as a witness for the defense because it bore the "taint" of a party criminally accused; (2) it enabled the State to produce evidence that was binding upon the brother though incompetent against the petitioner; (3) it enabled the State to "shift" its theory of prosecution from one charging the brother with willful and unlawful intent to one of innocent agency; (4) it enabled the State to try both defendants

(*) The argument in this Brief, in compliance with this Court's Rule 27, is made as summary and concise as possible.

as joint participants, acting in concert, so that the acts and declarations of one would be binding upon the other; and (5) it enabled the State to secure a conviction of petitioner by "confusion." Petitioner urged, too, that the injurious effects resulting from the joinder were aggravated by the fact that the trial judge, in his charge to the jury, gave "undue weight" to the testimony of the complaining witness Stefanelli.

The Appellate Division dealt specifically with each of the above grounds forming the basis of petitioner's contention of denial of fair trial, and it disposed of each of the grounds on the merits. The Appellate Division affirmed the judgment of conviction.

When petitioner took an appeal to the New Jersey Supreme Court by virtue of Article VI, Section V, Par. 1(a) of the New Jersey Constitution, the State moved to dismiss the appeal upon two grounds; namely, (1) that petitioner's denial of a fair trial was founded upon ordinary practice questions which were disposable by the accepted rules of common law and practice and procedure, and that such questions cannot be utilized for the purpose of creating a constitutional question and thus securing an appeal as a matter of right; and (2) that petitioner had failed to raise any constitutional question in the trial court by either a motion in arrest of judgment or any other appropriate motion for raising any constitutional issue.

The State took the position that in every criminal case the defendant could make the general claim that he was denied a "fair trial" when the basis for such claim consisted of nothing more than trial errors or irregularities of practice and procedure, and in that manner he would

not only obtain an appeal to the Appellate Division to which he would be entitled as a matter of right, but he would make it possible to "open the door" to a second appeal to the Supreme Court on the "colorable" constitutional question and thereby avoid the necessity of applying for a review by certification which lies in sound discretion.

A clear definition of a "fair trial" is given in *Johnson* v. *City of Wildwood,* 116 N. J. L. 462 (E. & A., 1936), as follows:

> "A fair trial is a legal trial; one conducted according to rules of common law except as in so far as it has been changed by statute; one where accused's rights are safeguarded and respected."

It has been held in New Jersey that any question not raised in the court of first instance need not be considered on appeal, except where it involves either public policy or jurisdiction. (*State* v. *Taylor,* 5 N. J. 474 (S. C., 1950); *State* v. *Jones,* 4 N. J. 207 (S. C., 1950)).

The excerpt from *State* v. *Pometti,* 12 N. J. 446 (S. C., 1953), quoted by petitioner (B. p. 33), sustains our contention that the New Jersey Supreme Court properly rejected petitioner's appeal on the constitutional ground submitted because the constitutional question was not a "substantial" but merely a "colorable" one. The rule is clearly stated, p. 450 of opinion:

> "An appeal is maintainable as of right under the particular clause of the Constitution only where the record reveals a substantial and not a merely colorable question arising under the Federal or State Constitution that has not been the subject of a conclusive

judicial determination. It is sufficient if there be a real and substantial controversy as to whether there has been full recognition of a right, privilege, or immunity granted by the Constitution, Federal or State, to the accused in a criminal case. The assertion of a denial of due process will sustain the appeal *unless the claim is palpably insubstantial, i. e., plainly and unmistakably deviod of merit.*" (Emphasis supplied).

In *Starego* v. *Soboliski,* 11 N. J. 29 (S. C., 1952), it is stated, p. 32 of opinion:

> "The mere allegation that a cause involves a constitutional question gives no right to an appeal under the rule. There must be a showing that a *substantial* constitutional question is involved and this must be set out with particularity. If it were to be held to be adequate that a mere allegation as to deprivation of property rights in a trespass case is sufficient to satisfy the requirements of Rule 1:2-1(a), then every case involving real property can be appealed to this court by the inclusion in appellant's brief of the open *sesame*—due process."

The State's motion for dismissal of petitioner's appeal in the New Jersey Supreme Court was withheld until final argument on the appeal, December 14, 1953. At the argument, petitioner's counsel was allowed extended time in which to discuss the merits of his contention of denial of a fair trial and of all the specific grounds upon which his contention was founded, and at the conclusion of his argument the Court, after careful and full consideration, concluded that "no constitutional question is presented under any of the six points raised," and that it was not "worthy of granting of certification."

We respectfully submit that the action of the New Jersey Supreme Court in dismissing petitioner's appeal, and denying certification, upon the ground that no substantial constitutional question had been presented, was justified.

POINT TWO.

Petitioner was not denied the right to a fair trial as embraced within the due process clause of the Fourteenth Amendment to the Federal Constitution by either the Prosecutor or the Court.

Under this point, in support of his claim of denial of a fair trial embodied in the 14th Amendment, petitioner discusses several general principles with which we do not disagree, except that they have no application here; as for example, that the "ideal" of a fair trial contemplates that a defendant's guilt or innocence should be resolved by competent evidence; and that his conviction should not be subjected to any strategy or maneuvering on the part of the prosecutor.

Apparently petitioner's chief complaint in his contention of denial of fair trial lies in the fact that the indictment charged both petitioner Joseph and his brother Nicholas jointly; that while Joseph was a public officer, Nicholas, the brother was not; that there was another companion indictment which charged the petitioner singly with the same crime; and that the moving for trial of the present indictment constituted a "strategic" act on the part of the prosecutor which facilitated petitioner's conviction and thus brought about the resultant injurious effect of denial of a fair trial.

With this we cannot agree.

In the first place, we know of no legal principle nor does petitioner cite any authority therefor, which made it incumbent upon the prosecutor to move the companion indictment for trial instead of moving the present indictment charging both defendants jointly. This was a matter which obviously rested in the discretion of the prosecutor to select whichever indictment he saw fit to move for trial, depending, of course, upon the nature and character of the evidence available to him at the time.

In the instant case, the prosecutor saw fit to move the present indictment because of the evidence in his possession which tended to show a participation by the brother Nicholas in the unlawful transaction between the defendant and Stefanelli, and that, although Nicholas was not a public officer, he received the money for Joseph under such circumstances as to amount to a receipt thereof by Joseph.

There is ample authority for the proposition that a non-officer may properly be joined with a public officer in an indictment for extortion.

In *People* v. *Brody,* 298 N. Y. 352 (Ct. App., 1949), there were three defendants jointly charged in an indictment for violation of Sec. 1826 of the New York Penal Code, which is substantially similar to the New Jersey extortion statute. The indictment charged a public officer named Brody (Deputy Commissioner of Marine and Aviation), and two outsiders named Auditore and Gross who were engaged in the shipping business. There were 16 counts in the indictment, 15 of which charged the receipt of "unlawful fees" in connection with the obtaining of

permits from Brody's department for the berthing of ships at the New York City piers, and the 16th count charged all three with conspiracy to ask and receive, on behalf of Brody, the illegal fees. The New York Court of Appeals sustained the conviction of all three defendants on all of the counts. It upheld the trial court's charge to the effect that the non-officers could be convicted upon a finding that they aided and abetted the public officer in taking the money, and that they received it as agents of Brody in carrying out their agreement of conspiracy, the court stating that under such circumstances "it was not essential that the money be traced into appellant Brody's pockets," and that, "The crime of taking unauthorized fees (like the crime of taking bribes under Section 372 of the Penal Law) can, obviously, be committed through an intermediary or agent." (Citing *Peo.* v. *Fitzgerald*, 288 N. Y. 58, and *Comm.* v. *Connolly*, 308 Mass. 481, 489, 490). Significantly, this is what the New York Court of Appeals said on the criminal liability of a non-officer, in *Peo.* v. *Brody, supra,* page 388 of opinion:

> "* * * Nor does it matter that Auditore, not being a public officer, could not, on his own account, have committed a crime under section 1826. As an aider and abettor of Brody, who was of the class of persons who could commit a crime as defined in the statute, Auditore, too, could be held as a principal. (Penal Law, sec. 2; *People* v. *McKane*, 143 N. Y. 455, 464; *Commonwealth* v. *Memmos*, 311 Mass. 94, 107, 108; *Downs* v. *United States*, 3 F. 2d 855, certiorari denied 268 U. S. 689; *Ex parte O'Leary*, 53 F. 2d 596). Auditore's act was Brody's act, and Brody's guilt was Auditore's. (See *People* v. *Madas*, 201 N. Y. 342, 352; *People* v. *Luciano*, 277 N. Y. 348, 359, 361)."

In the instant case, although Nicholas was not a public officer, he was properly joined in the indictment with Joseph, a public officer, upon the theory that he participated in the commission of the offense by Joseph and he thereby became a principal.

There was the evidence of Stefanelli that Nicholas accompanied him to Joseph's home and introduced him to Joseph as a cousin; that Nicholas told Joseph of Stefanelli's desire to get a permit for the Heller Parkway property; that subsequently Nicholas came to Stefanelli's gas station to have him go to the drug store to see Joseph; that Stefanelli did go to Nicholas's drug store where he had a conversation with Joseph in a back room and arranged for the payment of $2,800 in cash; and later Stefanelli delivered the money to Nicholas for Joseph.

We submit that under these circumstances there was ample justification for the finding of a joint indictment against both Joseph and Nicholas upon the theory of joint participation.

It is established in New Jersey that, in misdemeanors, all who aid, abet, or participate in the offense are principals, and all are equally guilty. (*State* v. *Ellrich*, 10 N. J. 146, 151 (S. C., 1952); *Engeman* v. *State*. 54 N. J. L. 241 (Sup. Ct., 1892)).

A.

As to the claim that the joinder in the indictment allegedly "eliminated" the value of Nicholas as a defense witness and his testimony "would bear the taint of a party, criminally accused."

As already pointed out, the evidence available to the State tended to show a participation by Nicholas in the offense committed by Joseph, and there was ample justification for a joint indictment against both of them jointly and charging them as principals.

The fact of the joinder, and the fact that the name of Nicholas remained in the indictment after his acquittal was directed by the court at the end of the State's case, did not eliminate the value of his testimony as a defense witness.

Under the New Jersey statute, *2A:81-1,* it is provided that, "No person shall be excluded as a witness" for any of the reasons set forth therein, such as conviction of crime, or having any interest in the outcome of the trial, etc.

And Nicholas did take the witness stand as a witness for his brother Joseph.

If petitioner's complaint is that he was deprived of the benefit of his brother's testimony as an "untainted" witness had he not been joined as a party defendant, and that his testimony would have carried greater weight with the jury had he not been a joint defendant, we submit there was no motion made before trial by either Joseph or Nicholas for a severance from the indictment. Furthermore, Nicholas was acquitted by the court before taking the stand in behalf of his brother, and both were given every safeguard by the court under the circumstances.

Whether the jury would have accorded greater weight to Nicholas's testimony had he not been jointly indicted is purely conjectural.

We submit there is no logical basis for petitioner's complaint in this regard, because the trial judge was careful to instruct the jury on its functions and on the subject of credibility to be attached to all of the witnesses who testified in the case.

This is what the court told the jury (R. 100-9):

> "• • • On the other hand, you, members of the jury, are the sole and exclusive judges of the facts, of the weight of the testimony, of the credibility of the witnesses, of the inferences to be drawn from the proven facts, and the ultimate and final conclusion to be reached on all the facts."

On the witness stand, Nicholas testified that Stefanelli was never in his drug store with the petitioner, and that he never delivered a sealed envelope to be delivered to petitioner.

After calling the jury's attention to the conflict Stefanelli's testimony and that of petitioner and his brother Nicholas, the Court said, (R. 107-20):

> "• • • That conflict you will have to resolve, you will have to determine where the truth lies. You are the judges of the credibility of the witnesses and of the weight to be given to their testimony. You saw them and you heard them, and you have had an opportunity to observe their attitude and demeanor on the witness stand. You may take into consideration the interest the witnesses who have testified for the State and for the defense have in the outcome of the

trial, or any motive that any witness may have in the giving of his testimony. And you will apply your own knowledge and observations of human actions, motives and conduct in your search for the truth."

The Appellate Division properly disposed of this point when it said (R. 147-23):

> "In support, it is first contended that the joint trial of the defendant Joseph Caprio with his brother Nicholas Caprio 'provoked the lowering of the bars guarding the right of an accused to a fair trial' because the 'effect of such joinder was to eliminate Nicholas Caprio as a witness, per se, for the defense. While such a joinder did not render Nicholas Caprio incompetent to testify, any testimony offered by him would bear the taint of a party, criminally accused.' Not only was there no elimination of Nicholas Caprio as a witness but, on the contrary, Nicholas Caprio did take the witness stand as a defense witness for Joseph; and before taking the stand as a witness for Joseph, Nicholas was acquitted and the jury was made duly aware thereof. Defendant Joseph made no claim before the trial court that a joint trial of the defendants would be prejudicial to him; he made no motion for a severance. This contention has no merit."

B.

As to the claim that the joinder had the effect of enabling the State to submit evidence binding upon Nicholas but incompetent against Joseph.

In support of his claim that he was denied a fair trial in that the joinder of Joseph and Nicholas in the indictment had the alleged injurious effect of enabling the State to submit evidence that was binding upon Nicholas but

incompetent against Joseph, defendant singles out a single instance, namely, when Stefanelli was asked what he did with the money, he replied (R. 32-9), "I put it in an envelope and delivered it over to Nick and told him to give it to Joe."

The evidence was that Stefanelli had two conversations with Joseph prior to the delivery of the money to Nicholas. The first was at petitioner's home when $5,000 was first suggested by petitioner as the price for obtaining a permit, and petitioner reduced it to $4,000 with the explanation, "Being you are a cousin, it will come back to you." (R. 22-28; 22-22). The second conversation was in the rear of Nicholas's drug store when, after some bickering over the price, $2,800 was finally agreed upon, and petitioner instructed Stefanelli to "put it in an envelope, no hurry about it, and leave it here to Nick." (R. 28-34).

Stefanelli testified that he raised the required $2,800 in cash, by having his check for $1,000 cashed, by getting together $800 from his two places of business, and by borrowing $1,000 from his friend Mascera. He put the cash in one of his business envelopes, sealed it, and "delivered it to Nick and told him to give it to Joe."

We respectfully submit that, because defendant had instructed Stefanelli to "put it in an envelope" and "leave it here to Nick," petitioner made his brother Nicholas his agent for the specific purpose of accepting the money, and under those circumstances the delivery of the money to Nicholas was the same as if delivery had been made personally to petitioner Joseph.

Furthermore, if petitioner's complaint is that Stefanelli's reply to the question as to what he did with the

money was hearsay, petitioner should have interposed an objection, or, at least, he should have moved to have the reply stricken from the record. But this he failed to do. Nor did his counsel submit any request for an appropriate instruction.

We do not consider the excerpts from the dissenting opinions in *State* v. *Mosley,* 102 N. J. L. 94, 113 (E. & A., 1925) and *State* v. *Tune,* 13 N. J. 203, 235 (S. C., 1953), quoted (B. pp. 42, 43) as controlling.

The *Mosley* case stands for the rule that, where the entire record is submitted for review on appeal, an erroneous admission or rejection of evidence will not be cause for reversal without "judicial action" taken, and there can be no judicial action without objection to the question complained of.

It is the accepted rule in New Jersey that admission of testimony without objection cannot be complained of on appeal. (*Rempfer* v. *Deerfield Packing Corporation,* 4 N. J. 135 (S. C., 1950)).

With respect to Revised Rule 1:5-1(a) of the New Jersey Supreme Court, which gives the appellate court the right to notice plain errors affecting the defendant's substantial rights although not brought to the attention of the trial court, the New Jersey Supreme Court made the following significant statement in *State* v. *Picciotti,* 12 N. J. 205 (1953), p. 211:

> "The rule is designed to allow the appellate court to consider plain error, though not brought to the attention of the trial court, when its conscience is shocked, when it is convinced that substantial justice was not done below, and that an unjust, unconscion-

able result was brought about by the error or errors first raised on appeal. * * * "

See, also, *State* v. *Western Union Telegraph Co.*, 12 N. J. 468, 497-498 (S. C., 1953).

Brown v. *State*, 178 So. 153 (Fla. Sup. Ct., 1938), cited by petitioner (B. p. 44), merely affirms the rule, with which we do not quarrel, that anyone convicted or acquitted of a conspiracy to commit a criminal act may not again be placed in jeopardy by trial for the same conspiracy to commit another criminal act. That situation did not arise here.

Bullock v. *State*, 65 N. J. L. 557 (E. & A., 1900), cited and quoted from (B. p. 45), does not lend support to petitioner's contention. That was a murder case in which the trial court erroneously allowed in evidence the testimony of a witness concerning a physical encounter between the witness and defendant many years before the crime then being tried. The evidence was held clearly incompetent and the reversal was grounded upon the trial court's failure to sufficiently eradicate it from the case by appropriate instruction.

We do not consider the evidence complained of as incompetent on the ground of hearsay, that when asked what he did with the money, Stefanelli replied, "I put it in an envelope and delivered it over to Nick and told him to give it to Joe," in view of the evidence that petitioner had designated his brother Nicholas as his agent for the purpose of accepting the money from Stefanelli.

Furthermore, it cannot be said that the evidence was such an error that it shocked the conscience and should

have been noticed as plain error on appeal, under Rule 1:5-1(a) and *State* v. *Picciotti, supra.*

We submit the Appellate Division properly disposed of the contention when it stated (R. 149-7):

> "* * * If counsel for defendant Joseph Caprio had desired to protect his client against the effect of any such testimony, he should have requested the court to instruct the jury that, although it was evidential against Nicholas Caprio, it was not evidential as against Joseph Caprio (*State* v. *Cortese,* 4 N. J. Misc. 683, Sup. Ct. 1926, aff'd 104 N. J. L. 447, E. & A., 1927), but this he did not do. We note that counsel for the defendant Nicholas Caprio sought and was granted this protection for his client. The defendant Joseph Caprio cannot now be heard to complain on this ground."

C.

As to the claim that the joinder had the effect of enabling the prosecutor to shift his position and theory of prosecution to meet the changing temper of the trial.

Under this point, defendant complains that the State, after the Court directed the acquittal of Nicholas at the end of the State's case, shifted its position from one of joint participation to that of innocent agency; that there was no lawful basis for any such "shifting" of theory, and that the so-called shift resulted in a "variance between the indictment and proof" and a denial of fair trial.

With this we cannot agree.

In the first place, the indictment was plain and distinct. It charged both defendants, Joseph and Nicholas, jointly with the crime of extortion under the statute, and the State

proceeded in its prosecution upon the single theory that both were equally guilty as joint participants in the offense charged.

At the end of the State's case, upon motion of Nicholas, the Court determined there was insufficient evidence of participation by Nicholas and lack of proof of knowledge of the arrangement between Stefanelli and Joseph Caprio to submit the case to the jury, and the Court eliminated Nicholas from the case and directed his acquittal. At that point, the State's case was completed, and there was no further affirmative proof submitted by the State.

In denying a similar motion by this defendant for his acquittal at that stage of the proceedings, the Court carefully summarized and weighed the State's evidence against him, and it determined that the evidence was such that the jury could legitimately infer that, "Nicholas, in receiving the money, was acting as the agent of Joseph," and that, "the jury was entitled to infer that payment to Nicholas was payment to Joseph" (R. 60-8 to 15).

Where was there any "shifting" of theory, or "variance" in the sense that the proof varied from the charge laid in the indictment?

The State was amply justified in joining Nicholas as a party defendant and that he actively participated in the commission of the crime by Joseph in view of the proof that he first accompanied Stefanelli to defendant's home where Stefanelli and defendant discussed the financial terms for obtaining the permit; that subsequently Nicholas came to Stefanelli's gas station to notify him, on two occasions, that defendant was waiting for Stefanelli in his

drug store; and that subsequently Stefanelli delivered the envelope containing $2,800 in cash to Nicholas and "told him to give it to Joe," in accordance with defendant's direction to Stefanelli that he should "put it in an envelope * * * and leave it here to Nick."

In denying defendant's motion for direction of his acquittal at the end of the State's case, the Court properly appraised and evaluated all of the competent evidence before it, and it concluded that there was sufficient evidence from which the jury could infer that Nicholas acted as defendant's agent for the purpose of accepting the money, and that payments to Nicholas was tantamount to payment to defendant Joseph, regardless of the theory upon which the evidence may have been presented.

We submit that the Appellate Division properly disposed of the contention when it stated (R. 149-18):

> "Further, it is argued that Joseph was deprived of a fair trial because the State shifted its theory from one charging Nicholas Caprio with corrupt and unlawful intent to one of innocent agency. The State sought a conviction against the defendant Nicholas Caprio under the indictment but, as pointed out above, the motion on behalf of Nicholas for acquittal was granted. We fail to see how the State shifted its theory as to Nicholas Caprio or how such a shift, if it did occur, was prejudicial to Joseph Caprio."

D.

As to the claim that the joinder in the indictment enabled the prosecutor to try both defendants as joint participants, acting in concert, so that the acts and declarations of one would be binding upon the other.

The gist of defendant's argument under this point seems to be that, petitioner's guilt of the crime must be established by proof that he "received" the money which concedly may be shown by circumstantial as well as direct evidence and since the only proof in the case is that Stefanelli made delivery of the envelope to Nicholas it was insufficient to establish receipt of the money by petitioner Joseph, but only a circumstance which required a charge on the principle of circumstantial evidence which the Court failed to do.

True, both defendants were charged and tried upon the theory that they were joint participants in the commission of the crime by Joseph, and as such they were equally guilty as principals.

On the question of whether a non-officer may properly be joined with a public officer in an indictment for extortion, the Court properly stated the accepted rule in granting the motion of Nicholas for a direction of acquittal at the end of the State's case by stating (R. 63-37):

> "Under our law, even though Nicholas is not a public officer, we regard all persons who participate in an offense of this sort as principals; so that if there were any proof in the case from which it could be inferred that Nicholas participated in the affair that is charged against Joseph, I would be required to deny this motion."

The Court granted Nicholas's motion for direction of acquittal upon the ground that evidence was inadequate and insufficient to establish his participation in the commission of the crime by petitioner Joseph.

However, as to this petitioner, the evidence was adequate and sufficient to justify the inference that he received the money. There was the evidence of Stefanelli that Nicholas brought him to petitioner's home where Stefanelli had a conversation with petitioner in which petitioner told him it would cost him money to get a permit, first mentioning $5,000.00 as the price but petitioner reduced it to $4,000.00, saying to Stefanelli, "Being you are a cousin, it will come back to you." There was the evidence that a few days later Stefanelli was called to Nicholas's drug store where, in a back room, Stefanelli had another conversation with petitioner, in which there was some bickering about the price and the sum of $2,800.00 was finally agreed upon, petitioner saying to Stefanelli, "put it in an envelope * * * and leave it here to Nick;" that in accordance with that instruction Stefanelli got together the $2,800.00 in cash, put it in an envelope, sealed it, and delivered it to Nicholas with the request to "give it to Joe." There was the evidence that after the Newark City Commission disapproved Stefanelli's application the first time, on the same day, petitioner saw Stefanelli at his gas station and told him, "Don't worry about it", that he "come over to get the money now," and that the reason for the City Commission's disapproval of the permit was that a party referred to as "Ralph" "didn't get it yet."

We submit that, from all of the above facts and circumstances, there was ample proof upon which to base the

legitimate inference that petitioner Joseph did receive the money.

It is to be noted that, while the Court expressed the view in denying petitioner's motion for a directed verdict of acquittal that, "the jury is entitled to infer that payment to Nicholas was payment to Joseph," it also expressed the view that, "Other portions of the testimony on that point support the other inference, that Joseph Caprio had not received the money that was in the envelope at that time" (R. 60-39).

As to the alleged omission by the Court to charge the jury on the principle of circumstantial evidence, we submit the petitioner should have submitted a timely request to charge on the subject; or he should have made objection to the charge as given because of the alleged omission, which he did not see fit to do. (*State* v. *Capawanna,* 118 N. J. L. 429 (Sup. Ct., 1937), aff'd 119 N. J. L. 337 (E. & A., 1938); *State* v. *Greely,* 11 N. J. 485, 494, 1953).

State v. *Kapelsohn,* 9 N. J. Super. 117 (App. Div., 1950), cited and quoted from (B. p. 52) is distinguishable. There, a prosecution for issuance of a check with intent to defraud in violation of R. S. 2:134-17, the reversal was grounded upon an erroneous charge in that, while the trial judge referred to R. S. 2:134-18 providing that delivery of the check shall be "prima facie evidence of intent to defraud," he failed to say anything about its meaning and that it was a presumption which could be rebutted by evidence. Then, too, while defendant failed to submit a request to charge, he did register positive objection to the charge because of the omission, and it was held that this required a supplemental charge which the judge failed to

give, and that the "failure to supplement the charge was prejudicial."

In the instant case, there was neither a request to charge nor any objection to the charge as given, as required by well-established principles.

The Court, in its charge, defined the crime and stated that one of the essential elements of proof was that, "he took or received from Ernest Stefanelli a fee or reward" (R. 102-10).

And it left it to the jury to draw whatever legitimate inferences it could from the proven facts when it stated (R. 100-9):

> "On the other hand, you, members of the jury, are the sole and exclusive judges of the facts, of the weight of the testimony, of the credibility of the witnesses, *of the inferences to be drawn from the proven facts,* and the ultimate and final conclusions to be reached on all the facts." (Italics ours).

We submit the charge, in its entirety, was fair, full and adequate; and it embodied every legal obligation consistent with established judicial practice.

And petitioner was given every legal protection to which he was entitled under the law.

The Appellate Division disposed of the contention under this point by stating (R. 149-32):

> "* * * We find no specific matter for review presented under this contention. We note, however, that no claim of prejudice was made by Joseph before the trial based on either the joinder of the defendants in the indictment or on the joint trial of the defendants."

E.

As to the claim that the joinder of both defendants in the indictment had the injurious effect of enabling the prosecutor "to secure a conviction by confusion."

Under this point, petitioner complains that the name of Nicholas Caprio still remained in the indictment when the jury took it with them into the jury room, which, coupled with the failure of the Court to caution the jury to ignore and remove from their consideration any reference therein to Nicholas, resulted in prejudice to petitioner Joseph.

It is to be noted that the Court disposed of the motion for direction of acquittal of Nicholas Caprio *in the presence of the jury*; and in doing so the Court addressed the jury at great length on its reasons for granting the motion (R. 61-15 to 64-35).

And in its final charge, the Court again referred to its direction of acquittal of Nicholas Caprio (R. 99-19):

> "Now as you are aware, at the close of the case of the State, on a motion made on behalf of the defendant, Nicholas Caprio, I concluded that there was not sufficient evidence to justify or to require the submission of the case to you for determination as to the defendant Nicholas Caprio. Consequently, for the reasons that I undertook to explain to you at some length when I granted the motion, the indictment ws dismissed as to that defendant."

There was no request for any instruction on the matter, and we fail to perceive how petitioner could possibly have been prejudiced, in view of the extensive instructions given on the main issue as to whether this petitioner Joseph

Caprio was guilty or innocent of the charge. (*State* v. *Capawanna, supra*).

Cases cited in footnote 40, page 54 of petitioner's brief (*State* v. *Erie R. R. Co.,* 84 N. J. L. 661 (E. & A., 1913), and *State* v. *Lang,* 87 N. J. L. 508 (E. & A., 1915)), merely stand for the accepted rule that, a charge which gives a correct legal principle in one part but an incorrect one in another part is reversible error, since the jury is under no duty to determine which is and which is not the correct portion.

Neither is *State* v. *Costa,* 11 N. J. 239 (1953) in point, cited and quoted from (B. p. 55, footnote 41). There, a prosecution for keeping a gambling place, the trial court erroneously allowed in evidence five indictments against different persons not then on trial who had pleaded non vult thereto, and it was held that this had an injurious effect of having the jury consider that since those persons admitted their guilt the defendant must likewise be guilty.

In the instant case, while there was no direct evidence that the envelope was delivered to petitioner Joseph, there was the evidence that it was delivered to Nicholas upon petitioner's direction that Stefanelli should do so, and from all of the facts and circumstances of the case the jury was amply justified in drawing the legitimate inference that petitioner Joseph did receive the money.

F.

As to the claim that the Court placed "undue weight" upon Stefanelli's testimony.

Under this point, petitioner's argument seems to be that the evidence supported a charge of bribery rather than

extortion; that extortion at common law contemplates an element of oppression which did not exist in the case; and that since the testimony of Stefanelli was that of a briber, the Court should have charged as if Stefanelli had been an accomplice, that his testimony should be regarded with suspicion and accepted only after careful scrutiny.

With this we cannot agree.

In this case, we are concerned not with the crime of bribery which is a separate and distinct offense, nor with the crime of extortion as it was known as common law.

We are concerned simply with the crime of extortion as it is defined in the statute (2A:105-1) under which petitioner was indicted and tried, which makes it a criminal offense for a publice officer to *receive* or *take* by color of his office a fee or reward not allowed by law for the doing of his office in the performance of his duties. Whether or not the payer of the money was technically a "briber," and whether or not he was oppressed, coerced or threatened is of no consequence.

If petitioner's complaint is that his conviction was procured on the uncorroborated testimony of the complaining witness, and that the Court failed to charge on caution to be given such testimony he should have submitted a request to charge. (*State* v. *Capawanna, supra*).

However, the legal proposition referred to was not applicable to the instant case because Stefanelli was nothing more than a complaining witness for the State, named as such in the indictment, and from whom the petitioner was charged with receiving and taking the money in violation of law.

He was not an "accomplice" of petitioner in the commission of the crime laid in the indictment, which is for the receiving and taking of the fee or reward.

Therefore, the principle that the jury should regard the testimony of a State witness with suspicion and accept it as true only after careful scrutiny, as exemplified by *State* v. *Hogan*, 13 N. J. Misc. 117 (Sup. Ct., 1935), aff'd 115 N. J. L. 531 (E. & A., 1935), and *State* v. *Edelman*, 19 N. J. Super. 350 (App. Div., 1952) (B. p. 56, footnote 45), applies only to the cases where the witness is an "accomplice" of the defendant in the commission of a crime with which both are being charged, and not to the case such as this where the defendant, a public official, is charged with receiving and taking a fee or reward from the complaining witness.

In its charge, after reviewing the testimony offered by the State and defense, the Court properly left it to the jury to determine the weight and credibility of the testimony of the witnesses on both sides, as follows (R. 107-16):

> "Now, you can see, members of the jury, from this outline of the testimony and from all the facts in the case, that there is a sharp and irreconcilable conflict between the testimony offered by the State and that offered by the defendant. That conflict you will have to resolve; you will have to determine where the truth lies. You are the judges of the credibility of the witnesses and of the weight to be given to their testimony. You saw them and you heard them, and you have had an opportunity to observe their attitude and demeanor on the witness stand. You may take into consideration the interest the witnesses who have testified for the State and for the defense have in the outcome of the trial, or any mo-

tive that any witness may have in the giving of his testimony. And you will apply your own knowledge and observation of human actions, motives and conduct in your search for the truth."

We fail to see where the Court placed any undue weight upon the testimony of Stefanelli.

We submit that in its charge, taken as a whole, the Court gave the jury a lucid and accurate definition of the crime charged; it explained the essential elements in detail; it submitted the case on the issues under the statute; and we submit the proofs amply supported the result reached.

VII.

Conclusion.

For the reasons hereinbefore set forth, we respectfully submit that petitioner was not denied a fair trial embraced within the due process clause of the 14th Amendment, and that the writ of certiorari should be denied.

Respectfully submitted,

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